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don't know because, again, I wasn't reviewing them. I hadn't reviewed a close package for -- for a long time. But I believe the standard practice that was still being carried out.

Q. Did you ever have any discussions with the debtor's independent board concerning any promissory notes that were issued by any of the affiliates or Mr. Dondero?

A. I can't -- I can't -- I can't recall specifically.

Q. Did you speak with the independent board from time to time?

A. Yes, from -- from -- from time to time I had discussions with the independent board members, you know, either -- either, you know, by themselves or wholly, you know, as -- as a -- as a combined work.

Q. Okay. Before we talk about Mr. Seery, do you recall ever having a conversation with Mr. Nelms or Mr. Dubel concerning any promissory note that was rendered by one of the affiliates or Mr. Dondero to Highland?

A. I don't recall any conversations

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specifically.

Q. Do you know if the topic was ever discussed, even if you don't remember it specifically?

MS. DANDENEAU: Objection to form.

A. It -- it -- it may have. I don't know. I don't recall.

Q. Do you recall ever discussing any promissory note issued by any of the affiliates or Mr. Dondero with James Seery?

A. I don't -- I don't recall specifically.

Q. Do you recall generally ever discussing the topic of promissory notes issued by any of the affiliates or Mr. Dondero to Highland with Mr. Seery?

A. Nothing -- nothing is really jumping out at me.

Q. Do you recall if you ever told Mr. Seery that any of the affiliates or Mr. Dondero didn't have an obligation to pay all amounts due and owing under their notes?

A. I don't recall having that conversation.

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A. I don't -- I don't recall.

A. I don't recall having a specific

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MS. DANDENEAU: Objection to form.

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Q. And did you believe that it was
rate at the time it was filed?

Q. Okay. Do you see that the total value of all properties listed in Part 1 is approximately \$410 million?

A. Yes, it is in 1c.

A. Yes, I see that.

Do you see that?

Q. And that was a reference to the
receivable from the affiliates and

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Highland?

A. Yes, we did do impairment analysis on -- on assets.

Q. Okay. Did you ever do an impairment analysis on any of the promissory notes that were given to Highland by any of the affiliates or Mr. Dondero?

A. Not that I recall.

Q. Under what circumstances do you prepare impairment analyses?

A. As -- as -- if you're preparing financials in accordance with GAAP, generally accepted accounting principles, if you're preparing full GAAP financials, you should be preparing -- you should be undergoing on a periodic basis any fair market value adjustments to assets.

As I was instructed at the time of the petition date, we weren't producing GAAP financials. So this wasn't something I was worried about nor concerned about.

Q. Okay. Were NexPoint and HCMFA and Highland's audited financial statements prepared in accordance with GAAP?

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2 A. The audited financials -- yes,
3 audited financial statements are prepared in
4 accordance with GAAP.

5 Q. Do you recall whether any of
6 Highland or HCMFA or NexPoint ever made a fair
7 market value adjustment to any of the notes
8 issued by any of the affiliates or Mr. Dondero
9 to Highland?

10 A. I do not recall that happening, but
11 the -- it is because under -- under GAAP,
12 the -- the treatment of liabilities is
13 different than assets.

14 Q. Okay. So then let's just focus on
15 Highland's audited financial statements.

16 The last audited financial
17 statements were for the period ending December
18 31st, 2018; correct?

19 A. That is my understanding.

20 Q. And you had -- you had an obligation
21 to disclose anything to PricewaterhouseCoopers
22 concerning any subsequent events between the
23 end of 2018 and June 3rd, 2019; correct?

24 MS. DANDENEAU: Objection to form.

25 MS. DEITSCH-PEREZ: Form.

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involved in the decision to reserve the Hunter Mountain Investment Trust note?

A. I was not.

Q. Do you know why Highland decided to reserve for the Hunter Mountain Investment Trust note?

A. I don't know yet decision was made.
I believe it was made by someone at DSI.

Q. Okay. I'm just asking if you know why.

Did you ever ask anyone why they reserved for that particular note?

A. I don't recall.

Q. Do you know whether the debtor reserved for any other note on this list during the bankruptcy?

A. Again, I don't recall. I wasn't part of any process of -- again, like any fair value adjustments or anything to that degree. Like I said, a lot of that was done by DSI and it was kind of out of our court.

Q. Okay. Do you know if any note receivable on this list was ever deemed by the debtor to be doubtful or uncollectible?

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2 A. I don't -- I don't have a
3 recollection of every filing, so I don't know.

4 Q. Did you ever have a discussion with
5 anybody at any time about whether any of the
6 notes receivable on this list should be deemed
7 to be doubtful or uncollectible?

8 A. No. As I previously stated, we were
9 told we didn't have to keep GAAP financials.
10 We weren't having -- you know, there is no
11 underlying audits being performed, so I mean,
12 it wasn't something I worried about.

13 MR. MORRIS: I move to strike.

14 Q. Did you ever have a conversation
15 with anybody about any of the notes receivable
16 and whether they should be deemed to be
17 doubtful or uncollectible? Did you have the
18 conversation, yes or no?

19 MS. DANDENEAU: Objection to form.

20 A. I don't recall.

21 Q. Do you recall ever telling anybody
22 that you believed any of the notes receivable
23 on this list should be doubtful -- should be
24 deemed to be doubtful or uncollectible?

25 MS. DANDENEAU: Objection to form.

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2 MS. DEITSCH-PEREZ: This is like the
3 fifth time you've asked it. Object to the
4 form.

5 MR. MORRIS: I'm moving to strike,
6 if you haven't noticed, because he's not
7 answering the question.

8 MS. DEITSCH-PEREZ: He was answering
9 the question, you just didn't like it, like
10 the answer.

11 MR. MORRIS: Good Lord.

12 Q. Go ahead, Mr. Waterhouse.

13 A. Again, I don't -- we brought up a
14 myriad of issues at the start of the bankruptcy
15 case. I don't recall if this was one of them,
16 but, again, there are a lot of things we
17 couldn't change. Even, you know, I was told
18 status quo, blah, blah, blah, right, there is a
19 stay, you can't -- you know, I don't recall
20 specifically, but that doesn't mean it didn't
21 happen.

22 MR. MORRIS: I move to strike.

23 Q. During the time that Highland was in
24 bankruptcy and you served as CFO, did you have
25 any reason to believe that any of the notes

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2 receivable on this list were doubtful or
3 uncollectible?

4 MS. DEITSCH-PEREZ: Object to the
5 form.

6 A. Potentially.

7 Q. Did you ever tell anybody that?

8 A. As I just stated like five times,
9 yes, we -- at the beginning after filing and we
10 were getting DSI and others up to speed, you
11 know, we had a myriad of discussions of a lot
12 of things and this was likely one of them. I
13 don't -- but I don't recall specifically we
14 talked --

15 Q. I don't want to know -- I don't want
16 to know what was --

17 MS. DEITSCH-PEREZ: Wait, wait.

18 Excuse me. Mr. Morris, you did not let him
19 finish his answer.

20 A. I spoke -- we had -- we were
21 bringing Fred Karesa and Brad Sharp (phonetic)
22 up to speed on all of these items, contracts,
23 and investments and going through -- we had
24 hours and hours and hours of discussion. And
25 then not only do I have to repeat this not

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once, twice, three, four times with -- you know, I mean, we -- I don't -- I don't remember the sum culmination of all these discussions. They all kind of blend together.

MR. MORRIS: Okay. I move to strike
and I will try one more time.

Q. Did you ever tell anybody at DSI that you believed any of the notes receivable on this list were doubtful or uncollectible?

MS. DANDENEAU: Object to form.

A. Potentially.

Q. Potentially you told them or potentially they were doubtful or uncollectible?

A. Potentially I told them that we needed to look at the value of these -- of these assets.

Q. Okay. Did you -- okay. It is potential that you told them and it is potentially that you didn't; right?

MS. DANDENEAU: Objection to form.

A. I've gone through that. I don't recall specifically.

Q. So you should just -- I don't want

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2 five times? I mean, really I thought you
3 were -- (overspeak.)

4 MR. MORRIS: Because he never
5 answered it.

6 MS. DEITSCH-PEREZ: Are you
7 listening to him?

8 MR. MORRIS: You know --

9 MS. DEITSCH-PEREZ: He basically
10 said that he had a conversation with DSI
11 that went over all of this stuff and that
12 conversation could have included the notes
13 but he doesn't recall specifically.

14 What more do you want him -- to ask
15 of him?

16 MR. MORRIS: I want him -- I would
17 love him to say -- I would like him to
18 testify to the truth, and that is he has no
19 recollection.

20 MS. DEITSCH-PEREZ: Well, the truth
21 as you would like to see it, but -- but he
22 is testifying truthfully. And I -- and, by
23 the way, I move to strike that comment --

24 MR. MORRIS: Okay.

25 MS. DEITSCH-PEREZ: -- because it

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2 Q. Do you believe that an affiliate
3 loan on this list was doubtful or
4 uncollectible? Would you have told that to
5 DSI?

6 MS. DANDENEAU: Objection to form.

7 MS. DEITSCH-PEREZ: Object to form.

8 A. If we had, like -- again, if we --
9 if -- if we weren't preparing financial
10 statements in accordance with GAAP, and -- you
11 know, if DSI at that point -- they were --
12 again, I was new to bankruptcy.

13 The CRO is -- we are delegating
14 everything to the CRO. All the decisionmaking.
15 Remember -- remember when you and I went into
16 Delaware Court and we were saying DSI basically
17 does everything, remember this, Mr. Morris?

18 You were my counsel at the time, and
19 basically we're running everything through DSI.
20 That was what this was like in the early part.

21 Everything was communicated through
22 DSI. So DSI says this. DSI says that. That
23 is what we're doing, and we're pointing out
24 things to them.

25 Now, they decide what direction this

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Q. And you signed them as the preparer of the document; correct?

Q. Okay. You wouldn't have signed the
 ment if you didn't believe it to be
 rate; correct?

Q. Okay. And do you have any reason to believe right now that any monthly operating report that has your signature on it was accurate in any way?

A. My understanding of the monthly reporting reports is we were filing them in accordance with the standards set by the Court. It wasn't -- you know, again, I don't -- you know, it wasn't GAAP. It wasn't these other standards, so I testified I didn't have experience in this. The CRO was running the

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2 show. I followed their advice.

3 Q. But you assured yourself that
4 everything in the report was accurate before
5 you signed them; correct?

6 MS. DANDENEAU: Objection to form.

7 A. I trusted the guidance from the CRO
8 and their team and their experience and their
9 guidance for doing this for many, many, many
10 years to -- to -- to categorize and put things
11 in ways on the form.

12 You know, my team had -- had not
13 filled out these forms before and needed all of
14 this guidance. I'm not an expert in this. I
15 have oversight of it. I signed the form. DSI
16 told me to.

17 Q. And you and your team are the source
18 of the information that DSI used to create the
19 reports; correct?

20 MS. DANDENEAU: Objection to form.

21 A. The books and records reside with
22 the -- with -- with the corporate accounting
23 team.

24 Q. Okay. And the corporate accounting
25 team was the corporate accounting team that was

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under your direction; correct?

A. Yes.

Q. So -- so your team was responsible for maintaining Highland's books and records; correct?

A. I'm sorry, my team was responsible?

Q. Correct.

A. Yes. They -- they -- they were the -- the -- the general ledger of Highland, that responsibility was with the corporate accounting team.

Q. The corporate accounting group reported to you; correct?

A. Yes.

MR. MORRIS: Can we put up 41,
please.

(Exhibit 41 marked.)

Q. All right. You will see that this is a report that is dated January 31st, 2020, but it is for the month ending December 2019.

Do you see that?

A. I do.

Q. And you signed this report in your capacity as the chief financial officer of

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2 Highland; correct?

3 A. Yes.

4 Q. And you're the preparer -- you're
5 identified as the preparer of the report;
6 correct?

7 A. That is correct.

8 Q. Do you recall participating in the
9 preparation of monthly operating reports?

10 A. As I testified earlier, it was put
11 together, you know, with the team. The team
12 worked with DSI to put these monthly operating
13 reports together. We had no experience at this
14 time of the monthly operating reports or things
15 of this nature.

16 MR. MORRIS: Can you turn to the
17 next page, please.

18 Q. Do you see a line item under assets
19 due from affiliates?

20 A. Yes, I do.

21 Q. Okay. And to the best of your
22 knowledge and understanding, as the person who
23 is identified as the preparer of this report,
24 does that line item include the affiliate loans
25 that we've been talking about?

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A. Again, I would have to see, just like we did with the financial statements of Highland and NexPoint, I would have to see a detailed build, but, you know, if you look at the other line items, you know, the only other place it could be would be in -- in other assets.

Q. Okay. And as a matter of arithmetic, is it fair to say that is the value of the assets due from affiliates was more than 25 percent of the value of Highland's total assets as of 12/31/2019?

MS. DANDENEAU: Objection to form.

A. I'm really not doing the mental math right now, so I've been going at this depo for hours, so I'm really not -- you know --

Q. All right. No problem.

A. -- these are millions of dollars.

Q. Let's look at the Footnote 1,
please. Do you see there is a reference to the
Hunter Mountain note?

A. Yes, I see that in Footnote 1.

Q. Okay. And that's the reserve that was taken against that note?

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2 A. Yes, that is what this indicates.

3 Q. Okay. And were you aware that the
4 reserve was being taken on that it was?

5 A. I was -- I was aware, yeah, at some
6 point, yes.

7 Q. Okay. And are you aware of any
8 reserve being taken with respect to any other
9 note that was issued in favor of Highland?

10 A. Again, as I testified, we didn't go
11 through an analysis on -- on -- on the other
12 notes.

13 Q. Can we turn --

14 A. I believe -- I believe it says that
15 in Footnote 1, fair value has not been
16 determined with respect to any of the notes.

17 So this footnote -- footnotes, look,
18 there has been no determination.

19 Q. Okay. The determination was made in
20 the audited financial statements just six
21 months earlier; right? We saw that earlier?

22 A. That was as of 12/31/18. I mean,
23 things -- circumstances -- there's a bank --
24 circumstances change, things change -- things
25 change over time, you know, facts and

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Q. Okay. And there was nothing that caused PricewaterhouseCoopers to include in subsequent events any adjustment to the conclusion that the fair value of the affiliate notes and the notes issued by Mr. Dondero equaled the carrying value; correct?

MS. DANDENEAU: Objection to the form.

A. That is correct. That is what was in the -- in the -- in the footnotes.

Q. Okay. So are you aware of anything that occurred between June 3rd, 2019 and December 31st, 2019 that would have caused the fair value of the notes to differ from the carrying value?

A. Yeah. Highland filed for bankruptcy, things changed -- I mean, there was a bankruptcy filed in October of -- of -- of 2019, right, the petition date that we've described earlier.

I mean, I had a -- I guess looking back naively, I thought we were going to get an audit from PwC for year-ended 2019, and when we had discussions with PwC, they were like, are

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you crazy, we're not auditing this. Values change, all these things change, bankruptcy changes the entire scenario. I mean -- and they're like, we're not -- we're not touching this.

And so, you know, I was like, okay, sorry, I get it, okay, no an audit.

I mean, it is -- you know, and --
you know, and we weren't preparing GAAP
financial statements.

Again, I didn't know what we were doing in relation to our financial statements, but these were the discussions I was having at the time. And yeah, I mean, filing bankruptcy from what I got from outside auditors and others involved changed things dramatically.

Q. Okay. Highland wasn't the obligor under any of the notes that we're talking about; correct?

A. No.

Q. So --

A. That's right.

Q. So can you identify any fact that would cause the fair value to deviate from the

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carrying value during the seven-month period
between June 3rd and the end of the year, 2019?

MS. DANDENEAU: Objection to form.

A. No. I mean, I'm putting myself back at that time, right. Hindsight is 2020, but we didn't do an analysis, but we would have done a fulsome analysis and looked at all of the facts and circumstances at the time, but asset values change. You know, there could have been a market crash in hindsight in 2020, which -- which affected entities' abilities.

There could have been all of these things, right, that -- that happen. It is -- it is easy to look back in hindsight, but when you are looking at this in -- in realtime, the analysis is different, and again, we didn't do an analysis.

Q. Okay. You didn't do an analysis.

Do I have that right?

A. I don't -- I don't recall doing one or maybe -- you know, I don't recall doing one.

MR. MORRIS: Okay. I'm going to

take a break. I may be done, so the time
now is -- is 4:30 your time. Let's just

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A. Yes, I testified that I was the treasurer and I didn't know if that incumbency certificate, you know, was one that appointed me as a treasurer, but yes.

Q. I'm just trying to confirm that sitting here today, to the best of your recollection, at that time you were -- your title was treasurer. It was not chief financial officer.

A. I don't recall that being my title.

Q. Okay. And in May of 2019, however, I think you testified you were the chief financial officer of the debtor; correct?

MR. MORRIS: Objection to the form
of the question.

A. Yes, I was -- yes.

Q. Okay. As such, in May of 2019, did you have the authority, to your understanding, to unilaterally loan \$5 million or \$2.4 million to anyone on behalf of the debtor?

MR. MORRIS: Objection to the form of the question.

A. Sorry, can you repeat that?

Q. Yes. So in your capacity as the

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Q. Okay. Now, I'm going to ask you a

In May of 2019, as the treasurer of

MR. MORRIS: Objection to the form

A. No.

Q. What would -- what would the

What would the approval process have

MR. MORRIS: Objection to the form

A. The process would have been similar

Q. And who was that individual?

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A. Yes.

Q. You mentioned when Mr. Morris was telling you the NAV error, N-A-V error, with respect to TerreStar, without writing us a letter, unless you feel like you have to, can you summarize what that NAV error was? What happened?

A. There was a -- in the Highland
al Allocation Fund, it owned at the time an
y interest in a company called TerreStar.
TerreStar is -- at the time was a private
any, and it may still be today. Again, I'm
ing myself back then as a private company.

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executed at market levels that were much lower than the Houlihan Lokey model.

And based on information and discussions with the portfolio managers and, you know, principals that were very familiar with TerreStar, it was determined that those trades were non-orderly and they were not considered in the valuation as consulted with Houlihan Lokey and PricewaterhouseCoopers at the time.

Subsequent to a -- I can't remember the exact circumstances of why the SEC got involved. I think it was due to this -- this investment became a material position in the fund. It triggered an SEC, kind of, inquiry. And as part of that inquiry, they questioned the valuation methodology. "They" meaning the SEC.

And at the culmination of that process -- this is all summarized -- the value that was -- that ultimately had to be used in the fund's NAV was different than -- materially different than what the original valuation at Houlihan Lokey provided.

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And given that there was this fund was, as we discussed -- I don't know if we discussed it, but it was an open-ended fund that was going -- that was converting to a close-end fund.

Due to the fact that it was an open-ended fund, you had to recalculate NAV and see what the impact was on people -- on investors coming in and out of the fund and if there is a detrimental impact and to calculate what that -- what that impact was and if there was any amounts owed to the fund pursuant to the error.

Q. Were you personally involved internally at either Highland or HCMFA with these investigations and discussions with the SEC?

A. I was.

Q. Which other key people or senior people at Highland were involved, to your recollection?

A. Myself, Thomas Surgent, David Klos, Lauren Thedford, Jason Post.

Q. Mr. Dondero, was he --

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2 A. I don't recall specifically.

3 Q. Do you recall whether HCMFA caused
4 any funds to be paid to the investors and the
5 fund the subject of the NAV error?

6 A. Yes.

7 Q. Do you recall the approximate amount
8 of funds, moneys paid to the investors and the
9 fund?

10 A. It was -- it was approximately
11 \$7 million.

12 Q. If I was to suggest 7.8 million,
13 would that ring more true or are you sticking
14 with your original answer?

15 A. It was -- it was approximately 7 --
16 7 to \$8 million. Again, I don't remember the
17 exact number, but it was in that ballpark.

18 Q. So regardless of whether HCMFA
19 accepted fault or liability, it caused some
20 \$7 million or more to be paid out to affected
21 investors in the fund?

22 MR. MORRIS: Objection to the form
23 of the question.

24 A. And I want to make sure I'm
25 understanding your question because there is a

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lot of different entities that are going on to
my head.

I think what you are saying is based on this error, shareholders were harmed by this approximately \$7.8 million -- by approximately \$7.8 million. Is that what you are asking?

Q. Yes, sir.

A. Yes, that was -- again, I don't have the exact numbers. If I take -- it was -- it was in that ballpark, and there is a detail calculation and write-up that could, that -- that exists someplace.

Q. Now, at that time, at the time that the NAV error occurred, was there a contract in place between HCMFA and the debtor pursuant to which the debtor was providing services to HCMFA?

MR. MORRIS: Objection to the form
of the question.

A. Yes.

Q. Was that contract generally called a shared services agreement?

A. It was generally called that, but there were -- there were -- I mean, it -- it --

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2 Q. And then you mentioned that the fund
3 was being closed and some compensation related
4 to that. Can you -- can you elaborate? What
5 were you referring to?

6 A. Right. So the advisor, pursuant to
7 board approval, put a proposal in front of the
8 shareholders of the Highland Global Allocation
9 Fund to convert it from an open-ended fund to a
10 closed-end fund.

11 So an open-ended fund, when
12 shareholders subscribe to the fund or redeem
13 into the fund, they do it at NAV.

14 When it is -- when you have a
15 closed-end fund, closed-end funds are -- are
16 publicly-traded, like on the New York Stock
17 Exchange, exchanges like that, and -- and
18 shareholders or investors, they're not --
19 they're -- they're not subscribing and
20 redeeming with the fund. They are like shares
21 of Apple.

22 Those shares of the Highland Global
23 Allocation Fund trade on an exchange, and that
24 is how you, you know, that is how, you know,
25 you become an equity owner in the fund or you

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2 yes, I would say it was -- it was all related
3 to that.

4 Q. Did Mr. Dondero tell you that those
5 funds would be a loan from Highland to HCMFA?

6 A. I don't recall.

7 MR. MORRIS: Objection to the form
8 of the question.

9 Q. Now, and forgive me, I'm probably
10 the only non-American born here, but I speak
11 reasonably well in English. I don't recall,
12 does that mean you don't remember or does that
13 mean it didn't happen?

14 MR. MORRIS: Objection to the form
15 of the question.

16 A. It -- it means I don't -- I don't
17 remember.

18 Q. Did Mr. Dondero tell you to have
19 those two promissory notes prepared?

20 A. I don't recall.

21 Q. When you -- again, when you say, I
22 don't recall today, that means that sitting
23 here today, you just don't remember one way or
24 the other. Is that accurate?

25 A. Yes.

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Q. Is it possible that you, having heard what Mr. Dondero said and seeing funds being transferred, assumed that that would be a loan without him actually telling you that would be a loan?

MR. MORRIS: Objection to the form
of the question.

A. Sorry, I want to make sure -- did I ask the amounts that were transferred that I -- that -- that I assumed that that was a loan?

Q. Well, let me -- let me take -- let me try again.

So you have established already that there were quite a number of promissory notes back and forth -- I'm sorry, quite a number of promissory notes with affiliated companies and individuals owing Highland money; right?

A. Yes.

Q. And you have established that there were many transactions and transfers going back and forth over the years; right?

MS. DANDENEAU: Objection to form.

A. In -- yes, in my capacity as CFO and my employment, yes, that is -- yes.

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2 Q. And that's part of the reason why
3 you just can't remember some of the details
4 today because this -- this happened years ago,
5 and there were a number of transactions. Is
6 that accurate?

7 MS. DANDENEAU: Objection to the
8 form.

9 MR. MORRIS: Objection to the form
10 of the question.

11 A. I mean, I deal with thousands of --
12 of -- of -- of transactions, you know, whether
13 it has -- the processing of transactions, you
14 know, if it has got, you know, more -- more
15 zeros, you know, behind it than others.

16 When you look at thousands of
17 transactions over the years for funds and
18 advisors and -- and, you know, financial
19 statements, I mean, it is -- it is very hard
20 going back in -- in -- in my -- you know,
21 14-ish year career at -- at Highland to
22 remember a lot of those details, especially
23 when I don't have any records or books or
24 anything like that, and -- and going back many
25 years.

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2 Q. Strike that.

3 Do you recall whether you sent an
4 email to anyone asking them to draft those two
5 promissory notes?

6 A. I don't recall because, again,
7 once -- I would have instructed -- likely
8 instructed the team to -- to work with the
9 legal group to draft these documents.

10 I -- I -- I -- yeah, I didn't -- I
11 mean, that is more an operational-type
12 procedure. So, you know, a manager or a
13 controller or working with legal. You know,
14 they -- they can certainly handle that task to
15 get that -- you know, to request that from
16 legal.

17 Q. And who on your team do you think
18 you would have asked to do that?

19 MR. MORRIS: Objection --

20 Q. Who would have been the logical
21 person or people, if you don't remember their
22 name today?

23 MR. MORRIS: Objection to the form
24 of the question.

25 A. It -- it -- there is only two

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2 go-ahead was to -- you know, we see the light
3 at the end of the tunnel with wrapping this up
4 and making shareholders whole -- sorry to say
5 "we" -- you know, the -- so the folks that are
6 involved in it.

7 I like to talk to people
8 face-to-face and -- and -- and go to -- and go
9 to their desk, because that shows if I'm going
10 to their desk that -- that is something that I
11 want done, you know.

12 Q. And do you remember, Mr. Waterhouse,
13 getting those two promissory notes in paper
14 format or by email before they were executed?

15 MR. MORRIS: Objection to the form
16 of the question.

17 A. I don't recall.

18 Q. For whatever was the ordinary course
19 back then in May 2019, would you expect to have
20 received them only on paper or would you have
21 expected to have received them in Word document
22 or PDF document by email?

23 MR. MORRIS: Objection to the form
24 of the question.

25 A. I -- I didn't sign -- I signed very

1 WATERHOUSE - 10-19-21

2 few documents via email. I can't say that it
3 never happened, but people either stopped by my
4 office and physically walked in documents for
5 signature that we discussed face-to-face.

6 Or documents were -- if -- if --
7 if -- if -- let's say I wasn't there or I
8 wasn't available, documents were dropped off.
9 I had -- I had some in- and outboxes in front
10 of my -- my office there at the Crescent.

11 Documents would be dropped off for
12 signature. There would be a cover sheet that
13 would be -- have been applied to those
14 documents detailing, you know, who dropped it
15 off, the purpose, why, what time.

16 And then, you know, as I stated, I
17 don't draft documents and I always go to the
18 legal group and the compliance group to make
19 sure that they're in the loop. And there is
20 a -- a box or section that says, Has legal
21 reviewed or approved, or something to that
22 nature.

23 Again, I don't -- I don't have
24 access to that cover sheet anymore, but it
25 was -- it was something to that effect.

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And my assistant, you know, if she was there, she would review that -- you know, whatever was being dropped off. And if that has legal, you know, reviewed or -- reviewed or approved it, if that wasn't -- if that stuff hadn't been done, it was like she would just tell them like, go -- go -- go to the legal group, because --

Q. Let me -- let me pause --

MS. DANDENEAU: Let him finish.

MR. MORRIS: Thank you. Go ahead.

A. I take -- go to the legal group because that -- that was my -- you know, I didn't -- I didn't review anything that -- that they weren't -- you know, or there wasn't some representation made to me that they had reviewed, approved in some capacity.

Again, my -- my -- my goal, as CFO, is to provide transparency and make sure that groups like compliance and other things -- and the other group in legal are -- are in -- you know, their -- they're made aware of transactions of -- you know, that are crossing my desk.

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Q. So if we summarize, you don't specifically remember signing these two notes, but most likely it would have been that they would have presented -- been presented to you physically on paper?

A. They would -- they would have been
presented physically on paper most likely or
one would have left it. But, I mean,
no, I don't -- I don't recall.

When you signed -- when you signed
instruments, when you personally signed
instruments, did you typically use a ink pen or
did you use a stamp?

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2 Q. Do you know -- was there a file at
3 Highland kept anywhere with ink-signed
4 originals of a promissory notes in general or
5 these two promissory notes specifically?

6 MR. MORRIS: Objection to the form
7 of the question.

8 A. Sorry, I just want to make sure I
9 understand your question. Are you saying is
10 there a file somewhere that has ink-signed
11 originals of these two promissory notes?

12 Q. Yes.

13 A. I would -- I would assume they're
14 some place. I mean --

15 Q. Well, was there a -- was there a
16 place where Highland generally kept originals
17 of promissory notes owed to it?

18 A. I wouldn't -- no.

19 MR. RUKAVINA: Mr. Nguyen, would you
20 please pull up my A7, alpha 7.

21 Q. These are the two promissory notes,
22 Mr. Waterhouse.

23 (Exhibit A7 marked.)

24 Q. And please -- Mr. Waterhouse, please
25 command my associate to scroll down as you need

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2 did have a -- an electronic signature, and that
3 was used from time to time. It wasn't as
4 common practice back in 2019. It definitely
5 was more common practice when we had to work
6 from home and remotely for COVID because it
7 that made it almost impossible to, right,
8 provide wet signatures since we're all working
9 from home remotely.

10 Q. Well, going just for these two
11 promissory notes, Mr. Waterhouse, in light of
12 your inability to remember any details, are you
13 sure you actually signed either or both of
14 those notes?

15 MS. DANDENEAU: Objection to form.

16 A. I don't recall specifically
17 signing -- actually physically signing these
18 notes. As I said before, I don't recall doing
19 that. This -- this looks like my signature,
20 but yet these two signatures are identical.

21 Q. So you don't recall physically
22 signing them, and I take it you don't recall
23 electronically signing them either?

24 A. I don't recall. You know, Highland
25 has all my emails. If that occurred, you know,

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Q. That is why I'm asking you these questions in great detail because I don't have those emails. I'm trying to -- I'm hoping that you will give me some names or some details so I can go look for more emails, but again, you don't remember any -- any individual, other than Mr. Dondero that we've discussed, you don't remember any individual with whom you discussed these promissory notes prior to their execution?

A. I don't recall discussing it with anybody else.

A. I mean, prior --

A. You know, there was no one else --
there was no one else in that meeting that I
talked with Mr. Dondero.

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2 MR. MORRIS: Objection to the form
3 of the question.

4 A. Yes.

5 MR. RUKAVINA: And, Mr. Nguyen, just
6 so that the record is clear, will you please
7 pull up my Exhibit Alpha 10, A10.

8 (Exhibit A10 marked.)

9 Q. You don't have this one in front of
10 you, Mr. Waterhouse? This is the one that
11 Mr. Morris used earlier. Do you see that
12 document, sir?

13 A. Yes, I do.

14 Q. And this is what you were testifying
15 about before when Mr. Morris was asking you.
16 Do you remember that?

17 A. Yes.

18 Q. So here is my question for you,
19 Mr. Waterhouse: As the chief financial officer
20 of Highland, was it prudent for Highland less
21 than three weeks later to be lending
22 \$7.2 million to an insolvent entity that
23 couldn't even then pay its debts back to
24 Highland?

25 MS. DANDENEAU: Objection to form.

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2 MR. MORRIS: Objection to the form
3 of the question.

4 A. Sorry, I just want to make sure --
5 are you asking me, did you say, was it prudent
6 for Highland to loan \$7.4 million to HCMFA a
7 few weeks after this document was executed?

8 Q. Yes, and at a time when HCMFA's
9 liabilities exceeded its assets.

10 MR. MORRIS: Objection to the form
11 of the question.

12 A. I don't -- it is odd. I don't know.

13 MR. RUKAVINA: You can take this
14 exhibit down, Mr. Nguyen.

15 Q. Do you recall asking anyone,
16 Mr. Dondero or -- or anyone outside as to
17 whether Highland ought to be lending
18 \$7.4 million to HCMF regarding HCMF's
19 creditworthiness?

20 MR. MORRIS: Objection to the form
21 of the question.

22 A. I don't recall.

23 Q. Did you receive personally any of
24 that \$7.4 million?

25 A. No.

1 WATERHOUSE - 10-19-21

2 \$7.4 million?

3 A. I would have to go back and look and
4 check in, you know, the -- the financial
5 records and the bank statements.

6 MR. RUKAVINA: You can take this
7 exhibit down, Mr. Nguyen.

8 Q. Mr. Waterhouse, I'm not trying to be
9 a smart-ass, but if the law says that because
10 of the way that you signed this promissory
11 note, if that is what the law says, that that
12 made you personally -- personally liable, then
13 you would agree with me that that was never
14 your intent?

15 MR. MORRIS: Objection to the form
16 of the question.

17 A. That was never -- I wouldn't sign a
18 note and not get consideration in return.

19 Q. So putting all other issues aside,
20 if the law -- if the law says that you were
21 liable for those notes because of how you
22 signed them, then would you agree with me that
23 these notes are a mistake?

24 MR. MORRIS: Objection to the form
25 of the question.

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2 A. Yes.

3 Q. Okay. And do you see an entry for
4 Highland Capital Management Fund Advisors?

5 MR. MORRIS: I'm sorry, hold on.

6 Where are you looking?

7 MR. RUKAVINA: Last page, John.

8 MR. MORRIS: Is it the page on the
9 screen?

10 MR. RUKAVINA: Oh, I'm sorry.

11 Mr. Nguyen just did it. Yes, the last page
12 there.

13 MR. MORRIS: Thank you.

14 Q. Do you see an entry there for HCMFA?

15 A. Yes.

16 Q. About \$10.5 million.

17 Do you see that?

18 A. I do.

19 Q. And, now, do you have any
20 explanation for why if HCMFA owed \$7.4 million,
21 plus the 5.3 million that had been extended,
22 why that amount was only 10.5 million?

23 A. I don't know. Okay.

24 MR. RUKAVINA: Close this one and
25 pull up, Mr. Nguyen, the schedules,

1 WATERHOUSE - 10-19-21

2 schedule of assets. What exhibit is this
3 of ours, Mr. Nguyen?

4 MR. NGUYEN: This is A11.

5 MR. RUKAVINA: Oh, this will be A11.
6 (Exhibit A11 marked.)

7 Q. You don't have this in front of you,
8 Mr. Waterhouse?

9 A. Okay.

10 Q. This is what Mr. Morris used
11 earlier. Do you remember looking at this with
12 Mr. Morris?

13 A. Yes.

14 MR. RUKAVINA: You might have to
15 zoom in a little. Okay.

16 Q. Now, I see Affiliate Note A, B, and
17 C.

18 Do you have any recollection as to
19 why the names of the affiliates are omitted?

20 A. I don't. I testified earlier that,
21 you know, the team worked with DSI in providing
22 these. I -- I don't -- I don't know.

23 Q. Can we deduce -- is it logical to
24 deduce that Affiliate Note A would be NexPoint
25 given its size of \$24.5 million?

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2 MR. MORRIS: Objection to the form
3 of the question.

4 A. I mean, it -- it is a -- it is -- it
5 is approximate.

6 Q. Well, can we -- can we deduce -- or,
7 I'm sorry, strike that.

8 Can you, sitting here today,
9 logically conclude that Affiliate Note B or C
10 represents HCMFA?

11 MR. MORRIS: Objection to the form
12 of the question.

13 A. I don't know. I don't know. I
14 can't.

15 Q. Okay. As of the petition date, we
16 have established that HCMFA, under promissory
17 notes, owed \$7.4 million and \$5.3 million to
18 the debtor; correct?

19 MR. MORRIS: Objection to the form
20 of the question.

21 A. Yes.

22 Q. Okay. And by my reckoning, that
23 would be somewhere approaching \$13 million.

24 MR. MORRIS: Objection to the form
25 of the question.

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you might have made a mistake by referring to a singular instead of a plural; right?

A. Yes.

Q. Okay. And you -- you wrote -- a couple of sentences later, you wrote: There was an agreement between HCMLP and HCMFA the earliest they could demand is May 2021.

You wrote that; right?

A. Yes.

Q. But I think you -- you agreed with Mr. Morris that that can't possibly apply to the May 2019 notes, can it?

MR. MORRIS: Objection to the form of the question. That is not what he testified to.

Q. Let me ask -- let me ask a different question.

Sitting here today -- or if you can answer me from your memory on October 6, 2020 -- did the April acknowledgment that extended the maturity date apply to the May 2019 notes also?

A. I don't recall specifically.

Q. Well, you recall that the notes that

1 WATERHOUSE - 10-19-21

2 you signed were demand notes; right?

3 A. Yes.

4 Q. Do you find it logical, based on
5 your experience, that had they intended to have
6 a different or a set maturity date, you would
7 have instructed that that set maturity date be
8 included instead of a demand feature?

9 MR. MORRIS: Objection to the form
10 of the question.

11 A. Sorry, just want to make sure I
12 understand. You are saying that -- that the
13 \$5 million note, the \$2.4 million note, if
14 those were supposed to be a term note, that I
15 would have made sure that those were a term
16 note?

17 Q. I'm saying -- I'm saying,
18 Mr. Waterhouse, that on May the 2nd and May the
19 3rd, 2019, if you intended that those two
20 promissory notes could not be called until May
21 2021, would you have included such language in
22 those two promissory notes?

23 MR. MORRIS: Objection to the form
24 of the question.

25 A. I guess -- I'm sorry, I don't recall

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2 A. Yes.

3 Q. If Mr. Dondero testifies that he
4 never told you to make these loans, would you
5 disagree with his testimony?

6 MR. MORRIS: Objection to the form
7 of the question.

8 A. Like I testified earlier with my
9 conversation with Mr. Dondero, all I recall is
10 he said, get the money from Highland.

11 Q. And if Mr. Dondero testifies that
12 he, in consultation with other senior personnel
13 at Highland, decided that Highland needed to
14 pay HCMFA \$7.4 million as compensation for the
15 NAV error and not a loan, would you have any
16 reason to disagree with Mr. Dondero?

17 MR. MORRIS: Objection to the form
18 of the question.

19 A. If that was -- if that was his
20 intent, yes, it would -- I would --

21 Q. Do you have any reason to disagree
22 with him?

23 MR. MORRIS: Objection to the form
24 of the question.

25 A. If that was his intent, I don't

1 WATERHOUSE - 10-19-21

2 Q. Again, the only thing you remember,
3 sitting here today, was Mr. Dondero said, get
4 the money from Highland, and that is it, that
5 is all you remember?

6 MR. MORRIS: Objection to the form
7 of the question.

8 A. I testified to that several times.
9 This was over two years ago. A lot has
10 happened. That is all I recall.

11 Q. And help me here. I'm not very
12 technologically astute. When you -- and I -- I
13 recognize that you do it rarely, but when you
14 sign a document electronically, do you believe
15 that there is an electronic record of you
16 having authorized or signed a document
17 electronically?

18 MR. MORRIS: Objection to the form
19 of the question.

20 A. I -- I don't know the tech answer to
21 that, but, you know, since I don't have -- I
22 don't ever attach my signature block
23 electronically, my assistant would have done
24 that, and if that is done over email like we
25 did several times -- you know, multiple,

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multiple times over COVID, she would attach my signature block and then email it out to whatever party.

Q. What was your assistant's name in May 2019?

A. It was Naomi Chisum.

Q. Is she the only one? I'm sorry, was she your only assistant that would have maybe facilitated logistically something like you just described?

A. You know, she was out on maternity leave at some point. I don't -- I don't recall those dates where she was out for maternity leave. There was -- there were folks backing her up. I don't recall specifically who those -- who those, you know, administrative assistants were, and I don't recall specifically if she was out during this time on maternity leave.

I do know that that she was out for a period of time, or who knows, or she could have been on vacation that day or, you know, I don't know.

Q. Switching gears now, the two

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2 Q. Obviously with COVID, it changed,
3 but -- but before COVID, did you used to meet
4 with Mr. Seery from time to time in-person?

5 A. Yeah, I mean, so before COVID -- so
6 we're talking kind of late March, early April,
7 right, there was about -- I don't remember the
8 specific date when the board for Highland was
9 appointed. I believe it was around February of
10 2020, so maybe there was a month-and-a-half,
11 two-month window where we were meeting
12 in-person or, you know, like we were actually
13 in the office, excuse me, we were in the
14 office.

15 And, you know, when they were first
16 appointed, the board members and Mr. Seery
17 were -- were definitely down here more
18 in-person.

19 Q. Did you ever see Mr. Seery taking
20 written notes of -- of his meetings with you or
21 others?

22 A. I don't recall.

23 Q. Do you recall on any Zoom or video
24 conference with Mr. Seery, seeing him take
25 notes, written notes?

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A. The Zoom calls we had, I don't recall having seen video or, you know, or if it was on Zoom, I just remember it being -- well, no, you know what, there were some -- you know, I take that back.

So there were -- there were some times that I did remember seeing Mr. Seery on -- on some of the Zoom calls.

Q. Well, let me --

A. I don't -- sorry, I'm thinking. I'm thinking -- I'm going back. I'm trying to process this.

Q. I can make it much quicker,
Mr. Waterhouse. I have heard -- I have heard
that Mr. Seery is a copious note taker.

Do you have any knowledge about
that?

A. No.

Q. Okay. Switching gears yet again, and this will be last theme. Do you need a restroom break, or are you good to go for another half an hour?

MS. DEITSCH-PEREZ: I need a
restroom break.

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Q. And was that shared services

agreement, to the best of your understanding,
in place as of December 31, 2020?

A. It was -- it was terminated at some
t, and I remember the contracts had
erent termination dates, but I think the --
date of termination was January 31st of
after the termination was put in.

So yeah, it would be in place at the
year of December -- it would be in
December 31st, 2020.

Q. And pursuant to that agreement as of November 31st, 2020, was the debtor providing you what you would describe as back office services to ExPoint?

A. Yes.

Q. Would those have included accounting
 _ces?

A. Yes.

Q. And as part of those accounting
 entries, would the debtor have assisted
 in point with paying its bills?

MR. MORRIS: Objection to the form
e question.

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2 Q. And was that how you-all internally
3 at Highland refer to NexPoint Advisors, L.P.?

4 A. I mean, yes, amongst other things.

5 Q. And she writes at the bottom of her
6 email: Okay to release?

7 Do you see that?

8 A. Yes, I do.

9 Q. So what --

10 MR. MORRIS: Hold on one second.

11 Okay. Go ahead.

12 MR. RUKAVINA: Yeah.

13 Q. So what is -- what is Ms. Hendrix
14 here on November 25 asking of you?

15 A. She is asking me -- so she -- these
16 are -- these are payments -- typically we would
17 do an accounts payable run every week at the
18 end of every Friday. But looking at this date,
19 it is Wednesday, November 25th, which means, to
20 me, it is likely Thanksgiving weekend.

21 So this is the day before
22 Thanksgiving, so this is the last kind of --
23 kind of day before the holidays and vacation
24 and things of that nature. So it is
25 effectively the Friday of that week.

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A. Yes.

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2 looking at -- I'm -- I'm looking at the date of
3 this email. It is November 30th. It is the
4 last day of the month.

5 HCMFA has obligations it needs to
6 pay to its broker-dealer, which is HCFD. And
7 it likely was short funds to make those
8 obligations under that -- under its agreement,
9 and so it provided a one-day loan because on
10 the next business day on 12/1 -- or the next
11 business day in December, it would receive
12 management fees from the underlying funds that
13 it managed and it would be able to pay back
14 that loan to NexPoint Advisors.

15 Q. So -- so here Ms. Hendrix was
16 seeking your approval to transfer \$325,000 from
17 NexPoint to HCMFA for a one-day loan; is that
18 correct?

19 A. That is correct.

20 Q. Let's flip to the next page, sir.

21 MR. RUKAVINA: And, Mr. Nguyen, if
22 you will please scroll down.

23 Q. Now we have as an entry for
24 \$325,000, 11/30 loan payment.

25 Do you see that, sir?

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the debtor would have played any role in
NexPoint having made those prior payments?

MR. MORRIS: Objection to the form
of the question.

A. Yes.

Q. And what role in years prior to 2020
would employees of the debtor have had with
respect to NexPoint making that annual payment?

A. We -- we -- we would have -- I keep
saying "we." The team would have calculated
any amounts due under that loan and other
loans, as -- as standard course.

We would -- since we provided
treasury services to the advisors, we would
inform the -- the -- the -- we informed
Mr. Dondero of any cash obligations that are
forthcoming, whether we do cash projections.

If, you know, any of these payments
would have -- or, you know, the sum total of
all of these payments, including any note
payments, if there were any cash shortfalls, we
would have informed Mr. Dondero of any cash
shortfalls. We could adequately plan, you
know, in instances like that.

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or accounting would have sent some schedule or a reminder that a payment would be coming due in the future. Is that generally the practice?

A. Yes, we would -- you know, again, I didn't -- I didn't micromanage the teams, but we had a -- a corporate accounting calendar that we use as kind of a tickler file to keep track of payments.

I actually, you know, don't know how actively they're using that in -- in prior to 2020, but it was actively used at some point.

We did look at NexPoint cash periodically and cash for the other advisors as well and payments. You know, we -- payments like this would have appeared in our cash projections, in the advisor's cash projections.

And, again, as like I said earlier, they would have appeared there, so there would be time to plan for making any of these payments.

Q. And based on your experience, would it have been reasonable for NexPoint to rely on the debtors' employees to inform NexPoint of an upcoming payment due on the \$30 million

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2 promissory note?

3 MR. MORRIS: Objection to form of
4 the question.

5 MS. DANDENEAU: Objection to form.

6 A. Yes. Yes, they did. I mean, but I
7 mean, but I don't think these -- these notes
8 were any secret to anybody.

9 Q. I understand, and I'm not suggesting
10 otherwise.

11 MR. RUKAVINA: Please pull up Alpha
12 2, Mr. Nguyen.

13 (Exhibit A2 marked.)

14 Q. Now, this document is similar to the
15 ones we've seen before as of December 31, 2020,
16 and I don't see under NTA anything there for
17 paying the promissory note to Highland.

18 Do you see anything like that?

19 A. I do not.

20 MR. RUKAVINA: You can pull that --
21 that exhibit down, Mr. Nguyen.

22 Q. You are aware, of course, by now
23 that, in fact, NexPoint failed to make the
24 payment due December 31, 2020, are you not?

25 A. I am aware, and yes, I do understand

1 WATERHOUSE - 10-19-21

2 borrower failed to make the required payment.

3 Are you with me so far?

4 A. I am.

5 Q. Did anyone then ask you, what should
6 we do with respect to our rights against the
7 borrower that missed the payment?

8 A. Not that I recall.

9 Q. Did you play a role in the decision
10 to accelerate that \$30 million promissory note?

11 A. I did not.

12 Q. Do you recall whether Mr. Seery ever
13 asked you before the acceleration as to whether
14 he should accelerate the note?

15 A. I don't recall.

16 Q. And you don't recall when you
17 learned of the acceleration itself?

18 MR. MORRIS: Objection to the form
19 of that question.

20 A. It was -- it was sometime in
21 early -- in early 2021. I don't remember
22 specifically.

23 Q. But do you recall whether it was
24 after the acceleration had already been
25 transmitted?

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2 MS. DANDENEAU: Objection to the
3 form of the question.

4 A. I don't recall.

5 Q. Do you recall in early to mid
6 January of 2021, after the default, discussing
7 the default with Mr. Dondero?

8 A. I do recall discussing with
9 Mr. Dondero after December 31, 2020?

10 Q. Yes, the fact of the default.

11 A. I don't recall.

12 MR. RUKAVINA: Let's pull up my
13 Exhibit 6, Alpha 6.

14 (Exhibit A6 marked.)

15 MR. RUKAVINA: And, Mr. Nguyen, if
16 you will please scroll down.

17 Q. This email chain begins with you
18 writing to Ms. Hendrix on January the 12th:
19 NexPoint note to HCMLP.

20 Do you see that, sir?

21 A. I do.

22 Q. Were you discussing this same
23 \$30 million note we're talking about right now
24 with Ms. Hendrix?

25 A. Yes.

1 WATERHOUSE - 10-19-21

2 Q. Okay. Do you recall what prompted
3 you to send that email to her?

4 A. Yes, I had -- I had a conversation
5 with Jim.

6 Q. Okay. And what -- what did you
7 discuss with Jim that led to this email chain?

8 A. He -- he called me and he said he
9 wanted to make payment on the NexPoint note,
10 and I didn't -- I didn't know the -- the amount
11 offhand, so I reached out to Kristin and got
12 the details and relayed that to him.

13 Q. And you see you sent that email to
14 her at 11:15 a.m. Does that help you remember
15 when you had this discussion with Mr. Dondero?
16 In other words, was it that morning or the day
17 before, or can you -- can you --

18 A. No, it was -- it was that morning.

19 Q. And do you recall how you had that
20 conversation with him?

21 MR. MORRIS: Objection to the form
22 of the question.

23 Q. By telephone, by email, in-person?

24 A. Yeah, he -- he called me. I was at
25 home. We were working from home here in

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December of 2020. He called me from home. He said he was in court. He wanted to -- he asked about, you know, making payment on the note and the amount, and so I didn't have those numbers in front of me, so I said I would get back to him. I wanted all the details, so here is this -- so I reached out to Kristin.

Q. And then she gave you that \$1,406,000 figure?

MR. RUKAVINA: Mr. Nguyen, if you will scroll up, please.

A. Yes. Yeah, she -- the \$1,406,112.

Q. And do you recall whether you conveyed that amount to Mr. Dondero?

A. Yes. I -- I called him back and gave him -- gave him this amount.

Q. Are you aware of whether NexPoint, in fact, then made that 1 million 406 and change payment?

A. Yes, they did.

Q. Did you discuss with Mr. Dondero at that time, either the first conference or the second conference that day -- strike that.

When you conveyed the number to

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2 Mr. Dondero, was -- was it also on January
3 12th?

4 A. Sorry, when I conveyed the
5 \$1.4 million number?

6 Q. Yes.

7 A. Yes, yes, it was that -- it was --

8 Q. So you had --

9 A. It was that point.

10 Q. Well, to the best of your
11 recollection, you had a conference with
12 Mr. Dondero by the telephone in the morning,
13 and then another conference with him by
14 telephone after 11:40 a.m. that morning?

15 A. Yeah, I can't remember -- yeah, it
16 was either that morning or it could have been,
17 you know, early afternoon, but again, I
18 remember calling him back, relaying this
19 information to him, and he said, okay, pay --
20 you know, make -- make this payment.

21 Q. And during either of those two
22 calls, did you tell Mr. Dondero anything to the
23 effect that making those -- I'm sorry, making
24 that payment would not de-accelerate the
25 promissory note?

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2 A. No.

3 Q. Did you tell him anything to the
4 effect that making that payment would not cure
5 the default?

6 A. No.

7 Q. Did you discuss that in any way with
8 him?

9 A. No, I did not.

10 Q. Did he say why he wanted to have
11 that \$1.4 million payment made?

12 MR. MORRIS: Objection to the form
13 of the question.

14 A. He -- he -- he didn't go into
15 specifics.

16 Q. Did he say anything to you to the
17 effect that if NexPoint makes that payment,
18 then the note will be de-accelerated?

19 MR. MORRIS: Objection to the form
20 of the question.

21 A. I don't recall.

22 MR. RUKAVINA: You can put this one
23 down, Mr. Nguyen.

24 Q. And, again, when you say you don't
25 recall, you mean you don't remember right now

1 WATERHOUSE - 10-19-21

2 either way; correct?

3 A. Yeah, I don't remember. I don't
4 remember us discussing that.

5 Q. Now -- and we're almost done, I
6 promise. I'm just going to -- I don't know how
7 to ask this question, so I'm just going to try
8 to do my best.

9 Prior to the default on December 31,
10 2020, did Mr. Seery ever tell you any words to
11 the effect that you or someone at Highland
12 should ensure that NexPoint doesn't make its
13 payment?

14 A. No.

15 Q. Did you have any hint or any belief
16 that anyone at NexPoint -- I'm sorry, strike
17 that.

18 Did you have any reason to believe
19 that anyone with Highland was actively trying
20 to get NexPoint to make that default by not
21 paying on December 31?

22 MR. MORRIS: Objection to the form
23 of the question.

24 A. Are you asking, did any Highland
25 employees actively work to make -- to

1 WATERHOUSE - 10-19-21

2 somehow --

3 Q. Yes. Let me take a step back. Let
4 me take a step back.

5 So you are aware now that as a
6 result of that default, what was still some
7 25-year note was accelerated and became
8 immediately due. You are aware of that now;
9 right?

10 A. Yes.

11 Q. And can you see how someone at
12 Highland might actually have been pleased with
13 that development?

14 MR. MORRIS: Objection to the form.

15 Q. Not that they were --- not that they
16 were pleased, but you can see how someone at
17 Highland might have been pleased with that
18 development?

19 MR. MORRIS: Objection to the form
20 of the question.

21 MS. DANDENEAU: Object to form.

22 A. I don't know how they would have
23 reacted to that.

24 Q. Okay. But you're not -- you're not
25 aware of any instructions or any actions being

1 WATERHOUSE - 10-19-21

2 given or taken at Highland by Mr. Seery, the
3 independent board, DSI, that -- that would have
4 basically led Highland to ensure that NexPoint
5 would fail to make that payment?

6 A. I'm not aware.

7 Q. In other words, there wasn't a trick
8 or a settlement; right?

9 MS. DEITSCH-PEREZ: Objection to
10 form.

11 MS. DANDENEAU: Object to form.

12 MR. MORRIS: Object to form.

13 A. I'm not aware.

14 Look, I'm not aware. I'm not in
15 every conversation. I mean, and I'm just --
16 again, I'm sitting at home. It is the end of
17 the year. Again, I'm not aware.

18 Q. That is a perfectly legitimate
19 answer. I don't know why -- why you think
20 otherwise.

21 Okay. Just give me one second to
22 compose my thoughts.

23 MS. DEITSCH-PEREZ: While you're
24 taking your one second, why don't we take
25 three minutes. I will be right back.

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testified earlier, we provided that accounting finance treasury function as -- under the shared services agreement. And so once I got the -- I talked to Jim, got the approval to make this payment, we have to then make the payment, or the team does, and so the payment was made.

Q. Okay. But -- okay. And -- and sitting here right now, after Jim called you, you don't remember talking to anyone other than the -- the couple of people you mentioned, talking to anyone about something to the effect that, hey, Jim wants to make this payment now?

MR. MORRIS: Objection to the form of the question.

A. I don't -- I don't recall.

Q. And does that include legal counsel?

Without going into any detail, on January 12th or before that payment was made, did you consult with legal counsel about anything having to do with the \$1.4 million payment?

A. I don't recall.

Q. Okay. Thank you, sir, for your

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Q. Good evening. I'm very sorry to be going last and I know you have had a long and taxing day, so I thank you for indulging me.

A. Yes.

Q. What kind of services did Highland provide to HCRE and HCMS?

MS. DEITSCH-PEREZ: What is your objection, John?

MS. DEITSCH-PEREZ: I got -- I understand your objection. That is fine.

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1 WATERHOUSE - 10-19-21

2 What kinds of services did Highland
3 provide to HCRE?

4 MR. MORRIS: Objection to the form
5 of the question.

6 A. HCMS, Highland employees provided
7 accounting services, treasury management
8 services, potentially legal services. I
9 don't -- but I wouldn't have been directly
10 involved in that. But as far as the teams that
11 I manage, it was accounting, treasury, things
12 of that nature.

13 Q. Okay. And that was for HCM, LLP --

14 A. And -- and, sorry, it would also be
15 any asset valuation if needed as well.

16 Q. Okay. We went back and forth on
17 each other and I apologize, so just to clarify.

18 You were talking about the services
19 that Highland Capital Management provided to
20 HCMS; is that right?

21 A. HCMS. So, again, yes. And
22 accounting, treasury, valuation, and also tax
23 services too.

24 Q. Okay.

25 A. Tax services. Look, I'm expanding

1 WATERHOUSE - 10-19-21

2 this, their HR services as well.

3 Q. Okay. And did that include bill
4 paying?

5 MR. MORRIS: Objection to the form
6 of the question.

7 Q. Did the services that HCM provided
8 to HCMS include bill paying?

9 MR. MORRIS: Objection to the form
10 of the question.

11 A. Yes.

12 Q. And did the services that HCMLP
13 provided to HCMS include scheduling upcoming
14 bills?

15 MR. MORRIS: Objection to the form
16 of the question.

17 A. Yes.

18 Q. And did HCMLP regularly pay -- cause
19 to be paid the payments on loans HCMS had from
20 HCMLP?

21 MR. MORRIS: Objection to the form
22 of the question.

23 A. Yes.

24 Q. Typically -- if there is a
25 typically, how far in advance of due dates did

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MR. MORRIS: Objection to the form
of the question.

Q. Okay. And over the course of time, HCMLP generally pay HCMS' loan payments in timely fashion?

A. I can't remember specifically, but
rally, yes.

MR. MORRIS: Objection to the form
of the question.

A. Yes, but I don't think it -- it added -- I don't think it provided HR

1 WATERHOUSE - 10-19-21

2 services.

3 Q. Can you describe the accounting and
4 treasury services that HCMLP provided for HCRE?

5 A. Yeah, it -- it would provide
6 bookkeeping services on a -- on a periodic
7 basis. It would make payments, you know, as
8 needed.

9 Q. Okay. So did it provide --

10 A. And -- and I believe it -- it -- it
11 provided tax services as well.

12 Q. Okay. And so did it provide the
13 same kind of bill -- did HCMLP provide the same
14 kind of bill-paying services for HCRE that it
15 provided for HCMS and NexPoint?

16 MR. MORRIS: Objection to the form
17 of the question.

18 A. Yes.

19 Q. And over the course of time, did
20 HCMLP generally cause to be made the loan
21 payments that HCRE owed to HCMLP?

22 MR. MORRIS: Objection to the form
23 of the question.

24 A. Yes.

25 Q. Did HCMLP make loan payment -- the

1 WATERHOUSE - 10-19-21

2 made?

3 MR. MORRIS: Objection to the form
4 of the question.

5 A. It was -- it was cash in HCRE's bank
6 account that would be used to make payments to
7 Highland Capital Management.

8 Q. Okay. And so did Highland Capital
9 Management have access to HCRE's funds in order
10 to be able to make such payments?

11 MR. MORRIS: Objection to the form
12 of the question.

13 A. Personnel at Highland Capital
14 Management had access to HCRE's bank account to
15 effectuate the payments.

16 Q. Okay. And was the payment due from
17 HCRE to HCMLP due in December of 2020 made?

18 A. It --

19 Q. In December of 2020.

20 A. It was not.

21 Q. Okay. And was there money in HCRE's
22 account that would have enabled the payment to
23 be made had HCM personnel attempted to make the
24 payment?

25 MR. MORRIS: Objection to the form

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A. I -- I don't recall.

A. I don't know.

A. We managed cash for so many different entities and funds, and I don't tell, you know, where the cash position was HCRC and HCMS at 12/31/2020.

A. I just don't recall, and I don't -- I don't remember what the loan payment obligations were from HCRE to Highland, and HCMS to Highland. I don't recall. I don't recall, I mean...

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Q. Okay. But so, Mr. Waterhouse, if --
payment on the HCMS loan was made in

1 WATERHOUSE - 10-19-21

2 January of 2021, do you think it was part of
3 the same conversation where Jim Dondero said,
4 hey, why didn't that get paid, please make
5 that -- get that payment done?

6 MR. MORRIS: I object to the form of
7 the question.

8 A. Yes. Likely it would have been -- I
9 mean, again, I don't recall a payment being
10 made, but, you know, again, I don't remember
11 everything.

12 Q. Okay. Did -- at the time you were
13 communicating with Kristin Hendrix about the
14 payment being made, whichever payments were
15 made in January, did she say anything to you
16 about the payments not curing the loan
17 defaults?

18 A. No.

19 Q. Okay. All right. So I'm going to
20 take you back to very early in the deposition
21 when Mr. Morris was asking you about the --
22 the -- the -- the agreement with respect to
23 the -- the forgiveness element of the loans, so
24 that is just to orient you.

25 Do you remember that there was a

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2 of the question.

3 A. The accounting standard is you have
4 to estimate to the best -- you know, to -- to
5 the best of your ability, the fair value of an
6 asset as of the balance sheet date under --
7 under GAAP.

8 Q. Did -- strike that.

9 Okay. Give me a minute. I'm
10 close -- I'm close to done. Let me just go off
11 and look at my notes for a second. So take two
12 minutes.

13 VIDEOGRAPHER: We're going off the
14 record at 7:02 p.m.

15 (Recess taken 7:02 p.m. to 7:03 p.m.)

16 VIDEOGRAPHER: We are back on the
17 record at 7:03 p.m.

18 Q. Mr. Waterhouse, is it generally your
19 understanding that people you work with now
20 have been asking the debtor for full and
21 unfettered access to their own former files?

22 MR. MORRIS: Objection to the form
23 of the question.

24 A. Yes, I am -- I am generally aware.

25 Q. Okay. And do you think you could

1 WATERHOUSE - 10-19-21

2 have been better prepared for this deposition
3 if the debtor had complied with those requests?

4 MR. MORRIS: Objection to the form
5 of the question.

6 A. I -- I -- I most certainly -- yes.
7 I mean, again, these are multiple years,
8 multiple years ago, lots and lots of
9 transactions.

10 You know, we asked about NAV errors
11 and, you know, things like that and these
12 are -- it would make this process a lot more --
13 a lot easier and if we had -- if we had access
14 to that.

15 Q. Okay. And has the debtor -- is the
16 debtor suing you right now?

17 A. Yes.

18 Q. And is the debtor trying to renege
19 on deals that it had previously made with you?

20 MR. MORRIS: Objection to the form
21 of the question.

22 A. Sorry, I need to -- it is my
23 understanding that the litigation trust is
24 suing me. And not being a lawyer, I don't
25 know -- is that the debtor?

1 WATERHOUSE - 10-19-21

2 Is that -- I don't know the
3 relationship. So, again, I'm not the lawyers.
4 I've said many times. But my understanding is
5 the litigation trust is suing me. I could be
6 wrong there. I don't know.

7 Q. Okay. I understand.

8 Someone with some connection to the
9 Highland debtor has brought a claim against
10 you; is that fair?

11 MR. MORRIS: Objection to the form
12 of the question.

13 A. Yes.

14 Q. Okay. And is there also some motion
15 practice in the bankruptcy where the debtor or
16 someone associated with the debtor is
17 attempting to undo something that was
18 previously resolved with you?

19 A. Yes.

20 Q. And so in one action somebody is
21 associated with the debtors trying to --
22 threatening you with trying to take money from
23 you, and then in the other -- and trying to --
24 and in the other they are threatening not to
25 pay you things that had previously been agreed;

1 WATERHOUSE - 10-19-21

2 is that correct?

3 MR. MORRIS: Objection to the form
4 of the question.

5 A. I want to be -- yes, I -- there
6 is -- I'm being sued, again, on -- on something
7 that was agreed to with Mr. Seery and myself.
8 I don't -- I don't -- I don't own that claim.

9 Q. Okay.

10 A. To be transparent, I don't own that
11 claim. So it is not my personal property.

12 Q. Okay.

13 A. And -- and being the nonlawyer, I
14 don't know how I can get sued for something
15 that I don't owe or, like, I don't own
16 anything. I'm not the lawyer. But, I mean, if
17 that is -- if I'm understanding the facts
18 correctly.

19 Q. Okay. And the lawsuit that was
20 filed that names you, that was just filed
21 this -- this past week; is that right?

22 MS. DANDENEAU: Ms. Deitsch-Perez, I
23 do want to interrupt at this point because
24 just as I told Mr. Morris, that this is a
25 deposition about the noticed litigation.

1 WATERHOUSE - 10-19-21

2 I really don't want to go -- go

3 afield --

4 MS. DEITSCH-PEREZ: Yeah.

5 MS. DANDENEAU: -- and open up a
6 whole new line of inquiry about the lawsuit
7 or the -- the motion and the bankruptcy
8 court. We will be here all night.

9 MS. DEITSCH-PEREZ: And I
10 understand.

11 Q. My -- my point is: Do you feel
12 like -- like there is some effort by these
13 parties related to the debtor to intimidate
14 you -- not that you -- I'm not saying you are
15 or you aren't.

16 But do you feel like there is some
17 effort to intimidate you and maybe an effort to
18 deter you from being as prepared as you might
19 be in this deposition?

20 MR. MORRIS: Objection to the form
21 of the question.

22 A. I was -- I was surprised by the
23 lawsuit, by me being named, because, again, I
24 don't own the asset and things like that.
25 Yeah, I just -- I want to move forward with my

1 WATERHOUSE - 10-19-21

2 life at Skyview.

3 MS. DEITSCH-PEREZ: Thank you.

4 THE WITNESS: Thank you.

5 FURTHER EXAMINATION

6 BY MR. MORRIS:

7 Q. If I may, I just have a few
8 questions.

9 Mr. Waterhouse, we saw a number of
10 documents that Mr. Rukavina put up on the
11 screen where Ms. Hendrix would send you a
12 schedule of payments that were due on behalf of
13 certain Highland affiliates.

14 Do you remember that?

15 A. Yes.

16 Q. And in each instance she asked for
17 your approval to make the payments; is that
18 right?

19 A. Yes, she did.

20 Q. And was that the -- was that the
21 practice in the second half of 2020 whereby
22 Ms. Hendrix would prepare a list of payments
23 that were due on behalf of Highland associates
24 and ask for approval?

25 A. Yes.

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2 Q. And I think you said that there was
3 a -- a --

4 A. It was -- I think I testified to
5 this earlier when we talked about procedures
6 and policy, you know, again, I want to be
7 informed of -- of -- of -- of -- of any
8 payments that are going out. I want to be made
9 aware of these payments, and that was just a
10 general policy, not just for 2020.

11 Q. Okay. So it went beyond 2020?

12 A. Yes.

13 Q. Is that right?

14 A. Yes.

15 Q. Okay. And the corporate accounting
16 group would prepare a calendar that would set
17 forth all of the payments that were anticipated
18 in the -- in the three weeks ahead; is that
19 right?

20 A. I -- like I testified earlier, we
21 had a corporate calendar that was set up, you
22 know, to -- to provide reminders or, you know,
23 of anything of any nature, whether it is
24 payments or -- or financial statements or, you
25 know, whatever it is, you know, to meet

1 WATERHOUSE - 10-19-21

2 deadlines.

3 I don't know how, as I testified
4 earlier, how much they were using that
5 calendar.

6 Q. Okay. But -- but you did get notice
7 and a request to approve the payments that were
8 coming due on behalf of Highland's affiliates.
9 Do I have that right?

10 MS. DANDENEAU: Objection to form.

11 A. I mean, generally, yes. I mean, you
12 know, as we saw with these emails, generally, I
13 mean, did that encompass everything, no.

14 Q. Okay. Do you know why the
15 payment -- do you know why there was no payment
16 made by NexPoint at the end of 2020?

17 A. Yes. There was -- there was -- we
18 talked about these agreements between the
19 advisors and Highland, the shared services and
20 the cost reimbursement agreement.

21 And in late 2020, there were
22 overpayments, large overpayments that had been
23 made over the years on these agreements, and it
24 was my understanding that the advisors were --
25 were talking with -- like Jim Seery and others

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to offset any obligations that the advisors owed to Highland as offset to the overpayments on these agreements.

Q. Okay. Did you participate in any of those conversations?

A. I did not.

Q. Okay. Do you know -- do you recall that the -- at the end of November, the debtor did notice to the advisors of their intent to terminate the shared services agreements?

A. Like I testified earlier, there was -- the agreements weren't identical, from what I recall, and there is one that had a longer notice period, which I think had a 60-day notice period. I don't recall which one that was, so not all of them were -- notice hadn't been given as of November 30th, for all of the agreements.

Q. Upon the receipt of the -- the termination notices that you recall, do you know if the advisors decided at that point not to make any further payments of any kind to Highland?

MR. RUKAVINA: Objection, form.

1 WATERHOUSE - 10-19-21

2 A. No. The advisors -- the advisors
3 had stopped making payments prior to that
4 notice.

5 Q. Okay. And how do you know that the
6 advisors stopped making -- making payments
7 prior to the notice?

8 A. I had -- I had a conversation
9 with -- with Jim Dondero.

10 Q. And did Mr. Dondero tell you that
11 the advisors would no longer make payments to
12 Highland?

13 MS. DEITSCH-PEREZ: Object to the
14 form.

15 A. Yes, he -- he -- again, he said
16 they -- they -- the advisors have overpaid on
17 these agreements, to not make any future
18 payments, and that there needs to be offsets,
19 and they're working on getting offsets to these
20 overpayment.

21 Q. Do you know if anybody ever
22 instructed Highland's employees to make the
23 payment that was due by NexPoint at the end of
24 the year?

25 A. Did anyone instruct Highland's

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2 employees to make that payment?

3 Q. Correct.

4 A. Anyone -- not that I'm aware.

5 Q. Were any of Highland's employees
6 authorized to make the payments on behalf of
7 its affiliates -- withdrawn.

8 Was any of Highland's employees
9 authorized to effectuate the payment on behalf
10 of NexPoint that was due at the end of the year
11 without getting approval from either you or
12 Mr. Dondero?

13 A. They had the -- they had the ability
14 to make the payment, but they didn't -- you
15 know, that -- that payment needed to be
16 approved.

17 Q. Okay. And it needed to be approved
18 by you or Mr. Dondero; is that right?

19 A. I mean, I'm not going to make the
20 unilateral decision.

21 Q. Is that a decision that you
22 understood had to be made by Mr. Dondero?

23 A. Yes. Sitting back in December of
24 2020, the -- that -- there was this off --
25 offset negotiation that -- that was happening,

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2 so I mean, until those negotiations were
3 resolved, you know, there wasn't any
4 payments -- there weren't any payments.

5 Q. And -- and there were no payments
6 until the negotiations were resolved because
7 that was the directive that you received from
8 Mr. Dondero; correct?

9 A. I don't think he said -- I mean, I
10 think -- yeah, I mean -- I'm trying to recall
11 the conversation. It was -- you know, there
12 is -- there is these negotiations. There's --
13 there needs to be these offsets. They're
14 talking with the debtor. So, you know, until
15 this is resolved, right, I mean, depending on
16 how, whatever that resolution was, were we to
17 take any action.

18 Q. Okay. How about with respect to
19 HCMS, did HCMS have a term payment due at the
20 end of the year?

21 A. Again, I don't -- I don't recall.

22 Q. Okay. You discussed briefly two
23 payments that were made in January of 2021, one
24 on behalf of NexPoint, and one on behalf of
25 HCMS. Do I have that right?

1 WATERHOUSE - 10-19-21

2 A. No. The two payments I recall were
3 NexPoint and HCRE.

4 Q. Okay. And those two payments --
5 thank you for the correction. And those two
6 payments were made because Mr. Dondero
7 authorized those payments to be made; correct?

8 A. Yes.

9 Q. And they hadn't been made before
10 that because Mr. Dondero had not authorized
11 them to be made?

12 MS. DEITSCH-PEREZ: Object to the
13 form.

14 A. Yes, because of these negotiations.

15 Q. Okay. Just a couple of more
16 questions.

17 Did anybody, to the best of your
18 knowledge, on behalf of HCMFA, ever tell the
19 SEC that HCMLP was responsible for the mistakes
20 that were made on the TerreStar valuation?

21 A. Did anyone from Highland on HCMFA's
22 behalf tell the SEC that Highland -- that
23 Highland was responsible for there -- I just
24 want to make sure --

25 Q. It was a little bit different, so

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2 let me try again.

3 A. These are very long questions, John.

4 I'm not trying to be --

5 Q. That is good. Do you know whether
6 anybody -- do you know whether anybody on
7 behalf of HCMS -- HCMFA ever told the SEC that
8 Highland was the responsible party for the
9 TerreStar valuation error?

10 A. Not that I'm aware.

11 Q. Okay. Did anybody on behalf of
12 the -- on behalf of HCMFA ever tell the retail
13 board that Highland was responsible for the
14 TerreStar valuation error?

15 A. Not that I'm aware.

16 Q. Do you know if HCMFA made an
17 insurance claim with respect to the damages
18 that were incurred in relation to the TerreStar
19 valuation error?

20 A. Yes.

21 Q. And do you know why they made that
22 insurance claim?

23 A. Because there was an error. I
24 mean --

25 Q. Was the insured's claim made -- was

1 WATERHOUSE - 10-19-21

2 the insurance claim made under HCMFA's policy?

3 A. Yes.

4 Q. Did HCMFA at any time prior to the
5 petition date -- withdrawn.

6 You were asked a couple of questions
7 where -- where you said that Mr. Dondero told
8 you that he was ascribing zero value to the
9 notes as part of a pot plan because he believed
10 that the notes were part of executive
11 compensation.

12 Do I have that right?

13 MS. DEITSCH-PEREZ: Object to the
14 form.

15 A. Yes.

16 Q. Okay. Have you ever heard that
17 before the time that Mr. Dondero told you that
18 in the conversation about the pot plan?

19 A. Had I heard that prior to my
20 conversation with Mr. Dondero?

21 Q. Yes.

22 A. No, I had not heard that prior.

23 Q. Okay. And that was in the context
24 of his formulation of the settlement proposal;
25 is that right?

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2 A. I mean, generally, yes. You know,
3 we were asked to provide asset values, right,
4 and he was having settlement discussions.
5 Again, I don't know who those went to
6 ultimately. I don't recall.

7 MR. MORRIS: I have no further
8 questions. Thank you very much for your
9 patience. I apologize for the late hour.

10 MS. DEITSCH-PEREZ: John, you stay
11 on about your email when --

12 MR. RUKAVINA: Hold on, I'm not
13 done.

14 MS. DEITSCH-PEREZ: Oh, okay. Davor
15 still has questions. Sorry. I was going
16 to say both John and Davor, could you stay
17 on afterwards just to talk about the
18 requests.

19 FURTHER EXAMINATION

20 BY MR. RUKAVINA:

21 Q. Mr. Waterhouse, you were just now
22 testifying about a discussion you had with
23 Mr. Dondero where he said something like no
24 more payments.

25 Do you remember that testimony?

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2 A. Yes.

3 Q. Okay. And was that late November or
4 early December of 2020?

5 A. It was, I would say, first or second
6 week of November.

7 Q. Okay. Do you recall whether --
8 whenever you had that discussion, whether
9 Mr. Dondero had already been fired by the
10 debtor?

11 A. Yes, I -- I believe he was not an
12 employee of the debtor anymore at that time.

13 Q. And when you were discussing this
14 with Mr. Dondero and he said no more payments,
15 you were discussing the two shared services
16 agreements and employee reimbursement
17 agreements we testified -- you testified about
18 before; is that correct?

19 MR. MORRIS: Objection to the form
20 of the question.

21 A. That is correct.

22 Q. And had your office or you -- and we
23 will talk at a future deposition about the
24 administrative claim.

25 But had -- by that time that you

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2 talked to Mr. Dondero, had your office or you
3 done any estimate of what the alleged
4 overpayments were?

5 MR. MORRIS: Objection to the form
6 of the question.

7 A. Yes, we had -- there was a -- there
8 was a detailed analysis that was put together
9 by David Klos at the time.

10 Q. And do you recall just generally
11 what the total amount for both advisors of the
12 overpayments was?

13 A. It was in excess of \$10 million.

14 Q. Was it in excess of \$14 million?

15 MR. MORRIS: Objection to the form
16 of the question.

17 A. I -- I remember it was an
18 eight-figure number. I don't remember
19 specifically.

20 Q. Okay. And did you convey that
21 number to Mr. Dondero when you had that
22 conversation?

23 A. Yes.

24 Q. What was his reaction?

25 A. I mean, he wasn't happy.

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2 Q. Is it fair to say he was upset?

3 A. Yes.

4 Q. Did Mr. Dondero ever expressly tell
5 you to not have NexPoint make the required
6 December 31, 2020, payment?

7 A. Yes, I recall him saying don't make
8 the payment because it was being negotiated, as
9 I discussed with Mr. Morris, this offset
10 concept. So there were obligations due by the
11 advisors to Highland, they should be offset
12 that -- you know, those obligations should be
13 offset by this -- by this overpayment.

14 Q. And when did he tell you that?

15 A. I would say -- I would say around --
16 probably December -- December-ish.

17 Q. Early December, late December?

18 A. I don't recall with as much
19 specificity as -- as -- as -- as stopping the
20 shared services payments, because we had
21 actually made one shared services payment in
22 November. So that is why I need to remember
23 that one more clearly. I don't remember where
24 exactly in December that conversation occurred.

25 Q. Did Mr. Dondero expressly use the

1 WATERHOUSE - 10-19-21

2 word "NexPoint" when he was saying don't make
3 these payments?

4 MR. MORRIS: Objection to the form
5 of the question, asked and answered.

6 A. Yeah, we were -- we were discussing
7 advisor obligations. So it was -- you know, it
8 was just obligations from the advisors.

9 And -- and he specifically talked
10 about the NexPoint payment as well.

11 Q. Okay. And it is your testimony that
12 he expressly told you not to make that NexPoint
13 December 31 payment?

14 MR. MORRIS: Objection, asked and
15 answered twice.

16 A. Yes, he -- he did, during that
17 conversation.

18 Q. And did you ever follow up with him
19 after that about whether NexPoint should or
20 shouldn't make that payment?

21 A. I did not.

22 Q. Did you ever, on or about
23 December 31, 2020, remind him and say, hey,
24 this payment is due, what shall I -- what
25 should I do?

1 WATERHOUSE - 10-19-21

2 A. I did not.

3 Q. So sitting here today, you -- you
4 remember distinctly that Dondero in December of
5 2020 expressly told you not to have NexPoint
6 make that payment?

7 MR. MORRIS: Objection, asked and
8 answered three times.

9 A. Yes.

10 Q. Can you say categorically it wasn't
11 just some general discussion where he told you
12 not to make payments?

13 MR. MORRIS: Objection, asked and
14 answer four times.

15 MR. HORN: Four times now. Go for
16 five.

17 A. Yes.

18 Q. Did you tell Mr. Seery that?

19 A. I don't believe I did. I don't
20 recall.

21 Q. And was this an in-person discussion
22 or telephone or email? Do you remember?

23 A. This was a phone -- a phone
24 conversation.

25 Q. Okay. Would you have a record of --

1 WATERHOUSE - 10-19-21

2 on your cell phone of when that conversation
3 might have taken place?

4 I'm sorry, strike that.

5 Was that by cell phone?

6 A. I believe -- yes, because we -- I
7 was at home. I mean, I don't have a landline.
8 All I have is my cell phone.

9 Q. Do you know whether your cell phone
10 still has records of conversations from
11 December 2020 on it?

12 A. My call log doesn't go back that
13 far.

14 Q. Okay. Thank you.

15 MR. RUKAVINA: I will pass the
16 witness.

17 MS. DEITSCH-PEREZ: Just a couple
18 quick questions.

19 FURTHER EXAMINATION

20 BY MS. DEITSCH-PEREZ:

21 Q. With respect to HCRE and HCMS, am I
22 correct there was -- there was no direction not
23 to pay those loan payments?

24 MR. MORRIS: Objection to the form
25 of the question.

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2 A. Yes, I don't recall having
3 conversations about, you know, those -- those
4 entities.

5 Q. And, in fact, what was the tone that
6 Mr. Dondero had when he talked to you about the
7 fact that HCRE and HCMS payments hadn't been
8 made when he found out that they hadn't been
9 paid?

10 MS. DANDENEAU: Objection to form.

11 MR. MORRIS: Objection to form.

12 Q. What was the tone he took with you?

13 A. Oh, it was -- it was -- it was -- it
14 was very negative. I mean, I think he cursed
15 at me and he doesn't usually curse.

16 Q. Okay. And in your mind, is that
17 consistent with the fact that he was surprised
18 that those payments hadn't been made?

19 MR. MORRIS: Objection to the form
20 of the question.

21 A. Yes.

22 Q. Okay. Thank you.

23 MR. MORRIS: I have nothing further.

24 Thank you so much, Mr. Waterhouse.

25 MR. HORN: I have no questions.

Subscribed and sworn to before me
this day of 2021.

C E R T I F I C A T E

Susan S. Klinger, RMR-CRR, CSR
Texas CSR# 6531

TSG Reporting - Worldwide 877-702-9580

HIGHLAND CAPITAL MANAGEMENT	§	
SERVICES, INC., JAMES DONDERO, NANCY	§	
DONDERO, AND THE DUGABOY	§	
INVESTMENT TRUST,	§	
	§	
Defendants.	§	
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§	
	§	
Plaintiff,	§	Adversary Proceeding No.
	§	
vs.	§	21-03007-sgj
	§	
HCRE PARTNERS, LLC (N/K/A NEXPOINT	§	
REAL ESTATE PARTNERS, LLC), JAMES	§	
DONDERO, NANCY DONDERO, AND THE	§	
DUGABOY INVESTMENT TRUST,	§	
	§	
Defendants.	§	

**HIGHLAND’S OBJECTION TO MOTION OF DEFENDANT NEXPOINT ADVISORS,
L.P. TO EXTEND EXPERT DISCLOSURE AND DISCOVERY DEADLINES**

Highland Capital Management, L.P., the reorganized debtor (“Highland”) in the above-captioned chapter 11 case (the “Bankruptcy Case”) and the plaintiff in the above-captioned adversary proceeding (the “Adversary Proceeding”), hereby objects (the “Objection”) to the *Motion of NexPoint Advisors, L.P. to Extend Expert Disclosure and Discovery Deadlines* [AP **Docket No. 86**]² (the “Motion”) filed by defendant NexPoint Advisors, L.P. (“NexPoint”) and joined by certain defendants in other related adversary proceedings. Highland fully incorporates by reference its contemporaneously filed brief (the “Brief”)³ in opposition to the Motions and would show unto the Court as follows:

² Unless specified otherwise, references to “AP Docket No. ___” are to the docket entries in NexPoint’s Adversary Proceeding, 21-03005.

³ Capitalized terms used but not defined herein shall take on the meaning scribed thereto in the Brief.

RELIEF REQUESTED

1. By this Objection, Highland respectfully requests that the Court enter an order denying the Motions seeking to extend the expert disclosure and discovery deadlines set forth in the Scheduling Order.

2. Pursuant to Rules 7.1(d) and (h) of the *Local Bankruptcy Rules of the United States Bankruptcy Court for the Northern District of Texas* (the “Local Rules”), the Brief is being filed contemporaneously with this Objection and is incorporated by reference.

PRAYER

WHEREFORE, PREMISES CONSIDERED, Highland respectfully requests that the Court enter an order (i) denying in whole the relief requested in the Motions, and (ii) granting Highland such further and additional relief as the Court deems just and proper.

Dated: December 1, 2021.

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HIGHLAND CAPITAL MANAGEMENT
SERVICES, INC., JAMES DONDERO, NANCY
DONDERO, AND THE DUGABOY
INVESTMENT TRUST,

Defendants.

HIGHLAND CAPITAL MANAGEMENT, L.P.,

Plaintiff,

vs.

HCRE PARTNERS, LLC (N/K/A NEXPOINT
REAL ESTATE PARTNERS, LLC), JAMES
DONDERO, NANCY DONDERO, AND THE
DUGABOY INVESTMENT TRUST,

Defendants.

Adversary Proceeding No.

21-03007-sgj

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**HIGHLAND’S MEMORANDUM OF LAW IN SUPPORT OF OBJECTION TO
MOTION OF DEFENDANT NEXPOINT ADVISORS, L.P. TO EXTEND EXPERT
DISCLOSURE AND DISCOVERY DEADLINES**

Highland Capital Management, L.P., the reorganized debtor (“Highland”) in the above-captioned chapter 11 case (the “Bankruptcy Case”) and the plaintiff in the above-captioned adversary proceeding (the “Adversary Proceeding”), hereby objects (the “Objection”) to the *Motion of NexPoint Advisors, L.P. to Extend Expert Disclosure and Discovery Deadlines* [AP Docket No. 86]² (the “Motion”) filed by defendant NexPoint Advisors, L.P. (“NexPoint”) and joined by certain defendants in other related adversary proceedings.³ In support of its Objection, Highland respectfully states as follows:

I. PRELIMINARY STATEMENT⁴

1. NexPoint’s Motion to modify the Scheduling Order is without merit and should be denied.

2. This Adversary Proceeding arises from NexPoint’s default under its Note in the original principal amount of \$30.7 million. The Note required NexPoint to make Annual Installment payments to Highland on December 31 of each year.

3. NexPoint blames Highland for its failure to timely make the Annual Installment payment. Initially, NexPoint contended that Highland breached its obligations by negligently failing to make the payment on NexPoint’s behalf. Then, Frank Waterhouse, an officer of NexPoint, a current employee of Skyview (the entity that services numerous of Mr. Dondero’s

² Unless specified otherwise, references to “AP Docket No. ___” are to the docket entries in NexPoint’s Adversary Proceeding, 21-03005.

³ See *Motion of Highland Capital Management Services, Inc. to Extend Expert Disclosure and Discovery Deadlines*, filed at Docket No. 91 in Adversary Proceeding 21-03006 (“HCMS’s Joinder”) (incorporating NexPoint’s Motion), and *Motion of HCRE Partners, LLC to Extend Expert Disclosure and Discovery Deadlines*, filed at Docket No. 86 in Adversary Proceeding 21-03007 (“HCRE’s Joinder”, and together with HCMS’s Joinder, the “Joinders,” and collectively with the Motion, the “Motions”) (incorporating NexPoint’s Motion).

⁴ Capitalized terms used but not defined in this Preliminary Statement shall have the meanings ascribed thereto below.

businesses), and Highland's former Chief Financial Officer, testified in his deposition that NexPoint failed to make the Annual Installment payment because Mr. Dondero instructed him in December 2020 not to make *any* payments to Highland from *any* of the entities that Mr. Dondero controlled.

4. NexPoint contends that, in light of this testimony, an expert is necessary to testify regarding whether Highland violated an "affirmative duty or obligation" it owed to NexPoint under Section 6.01 of the Shared Services Agreement to effectuate the payment on behalf of NexPoint, despite Mr. Dondero's instructions to the contrary. According to NexPoint:

[T]he question becomes whether Waterhouse or the Debtor 'put their head in the sand' in violation of any affirmative duty or obligation they may have had regarding the matter, such as; to ask Dondero whether they correctly understood him; to ask Dondero whether he meant NexPoint or the Note; to inform Dondero of the potential consequences of a default by potentially accelerating a 30-year promissory note; or to try to dissuade him from his decision.

Motion ¶ 13.

5. NexPoint's Motion to extend the expert disclosure and discovery deadlines in order to retain a testifying expert on Highland's duties of care under the Shared Services Agreement is without merit.

6. NexPoint's suggested expert testimony is improper because it concerns "the standards and duties of care under the parties' Shared Services Agreement" and otherwise seeks to interpret that Agreement for the Court. It is black-letter law that the determination of the existence and scope of contractual and other legal duties are improper subjects of expert opinion because they constitute legal conclusions that fall within the exclusive province of the Court.

7. Even if that were not the case (and it is), NexPoint fails to satisfy its burden of demonstrating "good cause" to modify the Scheduling Order under Rule 16(b) for three independent reasons. *First*, as set forth below, the Motion is untimely. *Second*, the suggested expert testimony is irrelevant because it would not assist a factfinder in determining any technical

or complex issues in this case. By its plain terms, the Shared Services Agreement does not impose an affirmative duty on—or even authorize—Highland to effectuate payments on behalf of NexPoint without authorization from a NexPoint Representative. NexPoint’s reliance on Section 6.01 as the source of Highland’s alleged duties is thus misguided, as that provision applies only to duties specifically set forth under the Agreement.⁵ **Finally**, allowance of the expert testimony at this late juncture would substantially prejudice Highland, with such prejudice being exacerbated (and not cured) by a continuance. If the Motion is granted, Highland will be forced to expend significant resources addressing NexPoint’s latest theories of its defense, including through additional discovery and motion practice. It will also cause a further delay of the trial on the merits, thereby impeding Highland’s ultimate recovery under the Note, all at the expense of Highland’s creditors.

8. Separately, as ill-conceived as the Motion is, the Joinders raise considerable questions of good faith, because neither Highland Management Services, Inc. (“HCMS”) nor HCRE Partners, LLC (“HCRE”) even alleges that it is a party to a shared services agreement (let alone the Shared Services Agreement submitted with the Motion), nor can it. The Motion seeks to “designate a testifying expert on the standards and duties of care under the parties’ Shared Services Agreement,” but the Joinders offer no explanation for why such expert testimony would have any relevance to them since they are not parties to **any** shared services agreement.

9. For the reasons set forth herein, Highland respectfully requests that the Court deny the Motion in all respects.

⁵ NexPoint offers no explanation for why Highland’s alleged obligations under the Shared Services Agreement supersede Mr. Waterhouse’s fiduciary duties to NexPoint. If anyone had a duty to ask Mr. Dondero “Are you sure?” or “Do you know what you’re doing” (an absurd concept on its own), it was surely Mr. Waterhouse—not in his capacity as a Highland employee—but in his capacity as an officer of, and a fiduciary to, NexPoint.

II. STATEMENT OF FACTS

A. The Note

10. On May 31, 2017, James Dondero (“Mr. Dondero”) signed a 30-year term note on behalf of NexPoint and in favor of Highland (the “Note”). Morris Dec.⁶ Exhibit 1.

11. The Note consolidated NexPoint’s obligations under five Prior Notes (as that term is defined in the Note) and was for an original principal amount of \$30,746,812.33. *See* Morris Dec. Exhibit 1, Ex. A. Highland received no consideration for consolidating the five demand notes into a single 30-year term note.

12. NexPoint and Mr. Dondero knew that NexPoint was required to pay Highland in Annual Installments, because it was spelled out plainly in the Note:

2.1 Annual Payment Dates. During the term of this Note, [NexPoint] shall pay the outstanding principal amount of the Note (and all unpaid accrued interest through the date of each payment) in thirty (30) equal annual payments (the “Annual Installments”) until the Note is paid in full. ***[NexPoint] shall pay the Annual Installment on the 31st day of December of each calendar year during the term of this Note,*** commencing on the first such date to occur after the date of execution of this Note.

Morris Dec. Exhibit 1 § 2.1 (emphasis added).

13. NexPoint and Mr. Dondero also knew the consequences of failing to timely make the required Annual Installment payments, because they were also spelled out plainly in the Note:

4. Acceleration Upon Default. ***Failure to pay this Note or any installment hereunder as it becomes due shall, at the election of the holder hereof [i.e., Highland],*** without notice, demand presentment, notice of intent to accelerate, notice of acceleration, or any other notice of any kind which are hereby waived, ***mature the principal of this Note and all interest then accrued, if any, and the same shall at once become due and payable*** and subject to those remedies of the holder hereof [i.e., Highland].

Id. § 4 (emphases added).

⁶ References to “Morris Dec. ___” are to the *Declaration of John Morris in Support of Objection to Motion of Defendant NexPoint Advisors, L.P. to Extend Expert Disclosures and Discovery Deadlines* being filed concurrently herewith.

14. Finally, Mr. Dondero expressly agreed on behalf of NexPoint to waive any notice of default or acceleration:

5. Waiver. [NexPoint] hereby waives grace, demand, presentment for payment, notice of nonpayment, protest, notice of protest, notice of intent to accelerate, notice of acceleration, and all other notices of any kind hereunder.

Id. § 5.

15. Thus, based on the plain terms of the Note executed by Mr. Dondero on NexPoint's behalf at a time when Mr. Dondero indisputably controlled both entities, NexPoint agreed (a) to make Annual Installment payments to Highland on December 31 of each year; (b) that Highland would have the unilateral right upon a default to accelerate all unpaid principal and interest due under the Note without notice or demand; and (c) to waive, among other things, a grace period, notice of nonpayment, notice of intent to accelerate, and "all other notices of any kind hereunder."

B. NexPoint Defaults under the Note and Highland Sues to Collect

16. NexPoint does not dispute that it failed to make the Annual Installment payment due under the Note on December 31, 2020 in the amount of \$1,406,111.92.

17. By letter dated January 7, 2021, in an exercise of its unambiguous and unconditional rights under the Note, Highland demanded that NexPoint immediately pay all unpaid principal and interest then due under the Note (the "Demand Letter"). Morris Dec. Exhibit 2. The Demand Letter stated:

Because of Maker's failure to pay, the Note is in default. Pursuant to Section 4 of the Note, all principal, interest, and any other amounts due on the Note are immediately due and payable. The amount due and payable on the Note as of January 8, 2021 is \$24,471,804.98; however, interest continues to accrue under the Note.

The Note is in default, and payment is due immediately.

Id.

18. On January 22, 2021, after NexPoint failed to meet its obligations under the Note, Highland commenced this Adversary Proceeding. [AP Docket No. 1].

C. NexPoint Blames Highland for Its Default

19. On March 1, 2021, NexPoint filed its *Original Answer* asserting, among other things, that “[p]ursuant to that certain Shared Services Agreement, [Highland] was responsible for making payments on behalf of [NexPoint] under the note” such that any “alleged default” was caused by Highland’s own negligence and breach of contract (the “Original Defense”). *Defendant’s Original Answer* [AP Docket No. 6] (the “Original Answer”) ¶¶ 39-41.

20. On August 9, 2021, NexPoint filed its *First Amended Answer*, which did not substantively alter its Original Defense. [AP Docket No. 50] (the “Amended Answer”) ¶¶ 39-41.

21. On September 1, 2021, after Highland amended its Complaint, NexPoint filed its *Answer to Amended Complaint* [AP Docket No. 64] (the “Final Answer”). The Final Answer did not substantively alter NexPoint’s Original Defense. *See id.* ¶¶ 80-82.

22. Thus, at all times prior to filing the Motion, NexPoint contended that its failure to timely make the Annual Installment due on December 31, 2020 was caused by Highland’s own alleged negligence and breach of the Shared Services Agreement.

D. The Court Enters the Scheduling Order

23. On September 6, 2021, the Court entered the *Order Approving Stipulation and Agreed Order Governing Discovery and Other Pre-Trial Issues* [AP Docket No. 70] (the “Scheduling Order”).

24. The Scheduling Order provides, in pertinent part, that “expert designations and disclosures of all opinions, and the bases therefor, will be made by October 29, 2021, and experts will be deposed between October 29, 2021 and November 8, 2021.” Scheduling Order ¶ 3.

E. Mr. Waterhouse Testifies that Mr. Dondero Instructed Him Not to Make Any Payments to Highland

25. In December 2020, Frank Waterhouse (“Mr. Waterhouse”) wore multiple hats that Mr. Dondero gave to him, including: (a) Chief Financial Officer of Highland; (b) Treasurer of NexPoint; (c) Treasurer of HCMS; (d) Treasurer of Highland Capital Management Fund Advisors, L.P. (“HCMFA”, and together with NexPoint, the “Advisors”); and (e) Principal Executive Officer of certain funds managed by the Advisors. *See* Morris Dec. Exhibit 3 at 24:2-25; 35:8-22; 120:7-12; 327:3-8.

26. At a recent deposition, Mr. Waterhouse testified that NexPoint did not make the Annual Installment payment due on December 31, 2020 because Mr. Dondero had instructed him in December 2020 not to cause any payments to be made to Highland. Mr. Waterhouse also testified that he never followed up with Mr. Dondero or reminded him that the payment was coming due at the end of the month. *See* Morris Dec. Exhibit 3 at 390:4-392:17.

27. Mr. Dondero testified that he was unaware of anyone ever instructing or authorizing Highland to make the Annual Installment payment due under the Note on NexPoint’s behalf. Morris Dec. Exhibit 4 at 462:16-463:9. Mr. Waterhouse concurred and confirmed that Highland’s employees were not authorized to make the Annual Installment payment due at the end of the year without prior approval:

Q: Do you know if anybody ever instructed Highland’s employees to make the payment that was due by NexPoint at the end of the year?

A: Did anyone instruct Highland’s employees to make that payment?

Q: Correct.

A: Anyone – not that I’m aware.

Q: . . . [Were] any of Highland’s employees authorized to effectuate the payment on behalf of NexPoint that was due at the end of the year without getting approval from either you or Mr. Dondero?

A: They had the – they had the ability to make the payment, but they didn’t – you know, that – that payment needed to be approved.

Morris Dec. Exhibit 3 at 381:21-382:16.

F. Highland’s Obligations under the Shared Services Agreement Were Limited to Those “Specifically” Identified Therein

28. NexPoint and Highland entered into that certain *Amended and Restated Shared Services Agreement* effective as of January 1, 2018 (the “SSA”). Rukavina Dec., Exhibit A.⁷

29. Article II of the SSA required Highland to provide “assistance and advice” with respect to certain specified services. Highland is unaware of any provision in the SSA—and NexPoint cites to none—that authorized Highland to control NexPoint’s bank accounts or required Highland to effectuate payments on behalf of NexPoint without receiving instruction or direction from an authorized representative of NexPoint.

30. In fact, Article II of the SSA expressly provided that “for the avoidance of doubt . . . [Highland] shall ***not*** provide any advice to [NexPoint] or perform any duties on behalf of [NexPoint], other than the back- and middle office services contemplated herein, with respect to (a) the general management of [NexPoint], its business or activities” SSA at § 2.02 (emphasis added).

31. To emphasize the point further, the SSA expressly curtailed Highland’s authority to act on NexPoint’s behalf:

Section 2.06 Authority. [Highland’s] scope of assistance and advice hereunder is ***limited to the services specifically provided for in this Agreement. [Highland] shall not assume or be deemed to assume any rights or obligations of [NexPoint] under any other document or agreement to which NexPoint is a party. . . .*** [Highland] shall not have any duties or obligations to [NexPoint] unless those duties and obligations are specifically provided for in this Agreement (or in any amendment, modification or novation hereto or hereof to which [NexPoint] is a party.

⁷ References to “Rukavina Dec. ___” are to the *Declaration of Davor Rukavina* [AP **Docket No. 86-1**] attached to the Motion.

Id. § 2.06 (emphasis added).

32. There can be no credible dispute that (a) the Note is a “document or agreement to which NexPoint is a party,” and that (b) the making of the Annual Installment payments were “obligations of” NexPoint under the Note.

G. The Instant Motion

33. Apparently stunned by Mr. Waterhouse’s testimony, NexPoint now seeks to extend the expert disclosure and discovery deadlines set forth in the Scheduling Order so it can obtain expert testimony regarding Highland’s legal duties under Section 6.01 of the Shared Services Agreement. Specifically, NexPoint proposes to retain an expert to testify “on the standards and duties of care under the parties’ Shared Services Agreement . . . with respect to Highland’s role in NexPoint’s alleged failure to make a December 21, 2020 payment on the Note (defined below); specifically, that Highland was responsible for ensuring that NexPoint made this payment.” Motion ¶ 1.

III. ARGUMENT

A. NexPoint’s Suggested “Expert Testimony” Is Improper as a Matter of Law

34. NexPoint’s suggested expert testimony is improper as a matter of law because it amounts to a legal conclusion.

35. A party may not offer an expert opinion on the scope of a party’s “legal duty” because such testimony amounts to a legal conclusion. *See Panhandle Adver., LLC v. United Rentals Realty, LLC*, 2:19-CV-189-Z-BR, [2021 WL 1112901](#), at *5 (N.D. Tex. Feb. 12, 2021); *Flax v. Quitman County Hosp., LLC*, 2:09-CV-101-M-D, [2011 WL 3585870](#), at *5 (N.D. Miss. Aug. 16, 2011).

36. NexPoint’s suggested expert testimony relates to Highland’s “duties of care under the parties’ [SSA]” and, specifically, whether “Highland was responsible” under the SSA for

“ensuring that NexPoint made” its Annual Installment payment under its Note. Motion ¶¶ 1, 18. This is precisely the type of expert testimony that courts preclude because it constitutes a legal conclusion. *See Panhandle*, 2021 WL 1112901 at *5 (granting plaintiff’s motion to exclude expert testimony “as to his opinions regarding the legal duties Defendant owed Plaintiff under the lease at issue” because “opinions on the duties owed by the defendants and whether they fulfilled those duties were legal conclusions and not the proper subject for expert testimony”); *Flax*, 2011 WL 3585870 at *5 (prohibiting expert testimony “on the issue of *law* of whether a duty of care was owed”) (emphasis in original); *Hanspard v. Otis Elevator Co.*, CIV.A. 05-1292, 2007 WL 839994, at *2 (W.D. La. Jan. 12, 2007) (granting plaintiff’s motion *in limine* to exclude expert testimony where “an opinion as to the scope of [party’s] contractual duties” constitutes a legal conclusion); *Taylor Pipeline Const., Inc. v. Directional Rd. Boring, Inc.*, 438 F. Supp. 2d 696, 706 (E.D. Tex. 2006) (finding expert testimony improper where it “opines as to the duties” owed by parties because “they amount to conclusions of law”).

37. The question of whether Highland owed or breached any legal duties is an issue for the trier of fact to decide. *See Askanase v. Fatjo*, 130 F.3d 657, 673 (5th Cir. 1997) (affirming lower court’s preclusion of expert testimony regarding whether officers and directors “fulfilled their fiduciary duties to the Company ... is a legal opinion and inadmissible. Whether the officers and directors breached their fiduciary duties is an issue for the trier of fact to decide. It is not for [the expert] to tell the trier of fact what to decide”).

38. Accordingly, NexPoint’s suggested expert testimony on Highland’s duties under the SSA is improper as a matter of law, and the Motion should be denied on this basis alone.

B. NexPoint Fails to Establish that Good Cause Exists to Modify the Scheduling Order

39. NexPoint fails to satisfy its burden of demonstrating good cause to modify the Scheduling Order.

40. Under Rule 16(b) of the Federal Rules of Civil Procedure, a scheduling order may be modified only for “good cause.” FED. R. CIV. P. 16(b)(4). Courts consider four factors in determining whether “good cause” is shown: “(1) the explanation for the failure to identify the witness; (2) the importance of the testimony; (3) potential prejudice in allowing the testimony; and (4) the availability of a continuance to cure such prejudice.” *Geiserman v. MacDonald*, 893 F.2d 787, 791 (5th Cir.1990). These are the same four factors used to determine whether to exclude expert testimony under Rule 37(c)(1) of the Federal Rules of Civil Procedure. *See Grand Time Corp. v. Watch Factory, Inc.*, 3:08-CV-1770-K, 2009 WL 10678210, at *2 (N.D. Tex. Nov. 18, 2009). Ultimately, “the good cause standard requires the ‘party seeking relief to show that the deadlines [could not] reasonably [have been] met despite the diligence of the party needing the extension.’” *Binh Hoa Le v. Exeter Fin. Corp.*, 3:15-CV-3839-L, 2019 WL 1436375, at *14 (N.D. Tex. Mar. 31, 2019) (quoting *S&W Enters., L.L.C. v. SouthTrust Bank of Ala., NA*, 315 F.3d 533, 535 (5th Cir. 2003)).

41. “Under Rule 16(b), the movant has the burden of showing good cause to modify a scheduling order.” *Grand Time*, 2009 WL 10678210 at *3. Whether to modify a scheduling order is within the court’s broad discretion. *See Geiserman*, 893 F.2d at 790 (“[O]ur court gives the trial court broad discretion to preserve the integrity and purpose of the pretrial order”) (internal quotations omitted); *Reliance Ins. Co. v. La. Land & Expl. Co.*, 110 F.3d 253, 257 (5th Cir. 1997). Moreover, “a trial court’s decision to exclude evidence as a means of enforcing a pretrial order must not be disturbed absent a clear abuse of discretion.” *Geiserman*, 893 F.2d at 790.

42. Each of the four factors weighs in favor of denying modification of the Scheduling Order.

1. NexPoint's Explanation for Failing to Timely Designate an Expert Is Deficient

43. NexPoint's explanation for its failure to timely designate an expert is disingenuous. NexPoint contends that, *inter alia*, its failure to previously designate an expert was "due solely to not having the benefit of Waterhouse's and Seery's recent deposition testimony," and that expert testimony is now "necessitated by Waterhouse's testimony and not any prior action or inaction of NexPoint Motion." Motion ¶ 21. NexPoint seeks to modify the Scheduling Order simply because the deposition of one of its witnesses did not go well. This is plainly improper under Rule 16(b). *See Reliance*, 110 F.3d at 257 (affirming lower court's denial of party's request to supplement expert report where "[movant] asked for an opportunity to avoid the deadline for its expert report merely because the deposition of its expert witness did not go well," noting that "[d]istrict judges have the power to control their dockets by refusing to give ineffective litigants a second chance to develop their case").

44. Moreover, NexPoint filed its Original Answer nine (9) months ago and its Original Defense was expressly based on the SSA. [AP Docket No. 6 ¶¶ 39-41]. Given the testimony of Mr. Dondero (which could not have been unexpected) and Mr. Waterhouse that NexPoint never authorized or instructed Highland to make the Annual Installment payment due on December 31, 2020, *see* Section II.E, *supra*, NexPoint has always had the burden of proving that Highland owed a duty under the SSA, yet it never offered expert opinions on the topic. If NexPoint wanted to offer "expert testimony" concerning Highland's duties under the SSA, it had nine months to do so, and Mr. Waterhouse's testimony, expected or not, does nothing to change that. *See Geiserman*, 893 F.2d at 792 (finding party failed to provide a "valid reason that would justify excusing him from the deadlines imposed by the lower court," noting "[t]he claimed importance of expert testimony underscores the need for [party] to have timely designated his expert witness," and "[t]he importance of such proposed testimony cannot singularly override the enforcement of local rules

and scheduling orders”). NexPoint’s conclusory statements regarding the need for expert testimony are insufficient under Rule 16(b). *See Binh Hoa*, 2019 WL 1436375 at *20 (finding “vague and conclusory statements regarding the need for additional information or facts do not adequately explain [party’s] failure to meet the expert deadline in the Scheduling Order”).

45. Accordingly, the first factor strongly favors denial of the Motion.

2. NexPoint’s Suggested “Expert” Testimony Is Irrelevant

46. The second factor—the importance of the suggested expert testimony— weighs heavily in favor of denying modification of the Scheduling Order.

47. In addition to being improper, the suggested expert testimony is also irrelevant. To be relevant, “expert testimony [must] ‘assist the trier of fact to understand the evidence or to determine a fact in issue.’” *Charalambopoulos v. Grammer*, 3:14-CV-2424-D, 2017 WL 930819, at *9 (N.D. Tex. Mar. 8, 2017) (quoting *Pipitone v. Biomatrix, Inc.*, 288 F.3d 239, 245 (5th Cir. 2002)).

48. NexPoint contends that its suggested expert testimony is “important because the duties of care as specified in the [SSA] are terms of art necessitating an expert analysis.” Motion ¶ 21. NexPoint’s reliance on Section 6.01 in support of its Motion is misplaced.

49. By its express terms, Section 6.01 does not impose a duty on Highland to make or effectuate Annual Installment payments on NexPoint’s behalf without authorization from a representative of NexPoint. Rather, Section 6.01 sets forth a “standard of care” that applies *only* with respect to the discharge of “duties under this Agreement.”⁸ In fact, to remove all doubt, the

⁸ Notably, and notwithstanding the “standard of care” set forth in Section 6.01, the SSA provides Highland with considerable exculpation and indemnification protections that alone defeat NexPoint’s Original Defense. For example, NexPoint agreed not to hold Highland liable for any acts or omissions unless it is determined by a court of competent jurisdiction to “be the result of gross negligence or to constitute fraud or willful misconduct.” Rukavina Dec., Exhibit A § 6.02. NexPoint also agreed to indemnify Highland “from and against any and all claims and causes of action” for, among other things, “negligence.” *Id.* § 6.03.

SSA emphasizes multiple times that Highland had **no** duties or obligations except with respect to those “specifically” identified therein. *See* Rukavina Dec., Exhibit A §§ 2.02, 2.06. NexPoint does not and cannot identify any provision in the SSA that imposes a duty on Highland to make Annual Installment payments on NexPoint’s behalf without direction from an authorized NexPoint representative. *See* Original Answer ¶¶ 39-41 (no SSA provision cited); Amended Answer ¶¶ 39-41 (no SSA provision cited); Final Answer ¶¶ 80-82 (no SSA provision cited); Motion, generally (citing only to Section 6.01).

50. Thus, based on the plain terms of the SSA and NexPoint’s own pleadings, expert testimony regarding Highland’s alleged “duties” is irrelevant. *See Geiserman*, 893 F.2d at 791 (affirming lower court’s refusal to modify scheduling order, noting that expert testimony “is not critical” if the issue at hand is “obvious to a layperson or established as a matter of law”); *Rolls-Royce Corp. v. Heros, Inc.*, CIV.A. 307-CV-0739-D, 2010 WL 184313, at *6 (N.D. Tex. Jan. 14, 2010) (“Testimony is irrelevant [] when an expert offers a conclusion based on assumptions unsupported by the facts of the case”).

51. Moreover, the suggested expert testimony will not help the factfinder understand a complex fact in issue. Contrary to NexPoint’s representations, this Adversary Proceeding does not involve complicated or technical issues. The issues in this Adversary proceeding are whether NexPoint defaulted on its Note and whether NexPoint can prove that Highland’s alleged “negligence” or “breach of contract” caused such default. Final Answer ¶¶ 80-82. These issues are well within a fact-finder’s understanding and are not the type which would necessitate an expert. *See Nola Ventures, LLC v. Upshaw Ins. Agency, Inc.*, CV 12-1026, 2014 WL 12721924, at *10 (E.D. La. Nov. 7, 2014), *on reconsideration*, CIV.A. 12-1026, 2014 WL 6090584 (E.D. La. Nov. 13, 2014) (excluding expert testimony where, “[d]espite Plaintiffs’ arguments to the contrary, this case is not about the complicated inner workings of the insurance industry. It is about whether

an insurance agent misrepresented the type of coverage that Plaintiffs believed they were purchasing, and whether Defendants owed a heightened duty of care to Plaintiffs. Nothing in [expert's] report or proposed testimony will help the jury to understand a fact in issue that is not within the common understanding of a lay juror"); *Henderson v. Atmos Energy*, 496 F. Supp. 3d 1011, 1017 (E.D. La. 2020) (excluding expert testimony as irrelevant and unnecessary where "it is one based in common sense").

52. At all relevant times, Mr. Waterhouse was an officer and a fiduciary of NexPoint, serving as its Treasurer. If anyone had an obligation to ask Mr. Dondero if he wanted to reconsider his instructions, it was Mr. Waterhouse in the first instance—not in his capacity as an employee of Highland, but as an officer and fiduciary of the obligor, NexPoint. Whether Mr. Dondero or Mr. Waterhouse is telling the truth is an interesting issue, but the Court need not resolve their dispute because it would only be relevant if the SSA imposed a duty on Highland to effectuate the Annual Installment payment without ever receiving any direction or instruction from a duly authorized representative of NexPoint. And, as Mr. Waterhouse testified, the SSA imposes no such duty.

53. Accordingly, the suggested expert testimony is irrelevant, and the Motion should be denied on this basis.

3. Allowing the Testimony Would Prejudice Highland

54. The third and fourth factors also weigh in favor of denying the Motion.

55. Allowing the suggested expert testimony would prejudice Highland because Highland would need to expend additional resources responding to NexPoint's latest theory of its defense by way of: (i) retaining a rebuttal expert; (ii) deposing NexPoint's expert; or (iii) moving to strike the expert testimony. *See Geiserman*, 893 F.2d at 791 (affirming lower court's striking of untimely witness designation and preclusion of expert testimony where delay of "a couple

weeks in designating the expert witness” would have “disrupted the court’s discovery scheduling and the opponent’s preparation,” and resulted in “expense that would result from an extended discovery schedule for [movant’s] failure to adhere to deadlines,” noting that “the trial court has latitude to control discovery abuses and cure prejudice by excluding improperly designated evidence”); *Binh Hoa*, 2019 WL 1436375 at *20 (“It would [] be patently unfair to allow Plaintiff to supplement and amend his expert report this late in the case without: (1) allowing Defendants to amend their expert designations and provide an expert report to address the matters in Plaintiff’s amended and supplemental expert reports, (2) giving Defendants an opportunity to depose Plaintiff’s expert regarding his most recent opinion . . .”).

56. A continuance would not cure this prejudice because the trial on the merits of the underlying action would be unnecessarily delayed. This would ultimately delay Highland’s potential recovery under the Note and distributions to creditors under Highland’s Plan. *See S&W Enters.*, 315 F.3d at 537 (affirming lower court’s denial of untimely submission of expert report where defendant would be forced to conduct additional discovery in response to movant’s new materials, noting that “while a continuance could be granted for additional discovery . . . a continuance would unnecessarily delay the trial”); *Reliance*, 110 F.3d at 257-58 (affirming lower court’s denial to modify scheduling order to add expert testimony where court found “[t]o allow plaintiff to add more material now and create essentially a new report would prejudice the defendants, who would then have to get an expert to address these last-minute conclusions, and thus disrupt the trial date in this case”) (internal quotations omitted); *Geiserman*, 893 F.2d at 791 (finding that while attorney “could have conducted new discovery and redeposed witnesses under a continuance in response to the untimely designation, this would have resulted in additional delay and increased the expense of defending the lawsuit”); *Binh Hoa*, 2019 WL 1436375 at *20 (“Ordering another continuance would only serve to reward Plaintiff for his dilatory conduct and

failure to comply with court-ordered deadlines and this district's Local Civil Rules and result in additional delay and expense. Regardless, it is not incumbent on the court to award litigants for failing to develop their cases”). A simple collection action like the Adversary Proceeding should not be continually extended simply because the defendant is unsatisfied with its defenses and the evidence adduced in discovery.

57. For these additional reasons, NexPoint fails to demonstrate good cause to excuse it from the deadlines set forth in the Scheduling Order. Accordingly, the Motion should be denied.

C. HCRE’s and HCMS’s Joinders Have Even Less Merit than the Motion and Should Be Denied

58. The Joinders are even more frivolous than the Motion. In addition to the reasons set forth above, neither HCMS nor HCRE was ever a party to any shared services agreement with Highland, let alone the SSA that is the foundation of the Motion. Accordingly, the Joinders are without merit and should be summarily denied by the Court.

CONCLUSION

For the foregoing reasons, Highland respectfully requests that the Court (i) deny the Motions and (ii) grant such other and further relief as the Court deems just and proper.

Dated: December 1, 2021.

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